



TOWN OF FAIRFAX

STAFF REPORT

March 1, 2017

TO: Mayor and Town Council

FROM: Michele Gardner, Town Clerk *GT*

SUBJECT: Adopt a Resolution Amending the Conflict of Interest Code (Form 700 filers) to include Fairfax Open Space members on the List of Designated Positions

RECOMMENDATION

Adopt the Resolution Amending the Conflict of Interest Code for the Town of Fairfax to Include Fairfax Open Space Members on the List of Designated Positions.

DISCUSSION

The Political Reform Act (Government Code Section 81000 et seq.) requires local government agencies to adopt and promulgate conflict of interest codes, and to revise them if necessary. Designations of positions and disclosure categories are made pursuant to 2 CCR 1870, which essentially states that a designated individual is one who has decision-making authority. Such individuals are required to submit a Statement of Economic Interest (Form 700).

Last year, staff contacted the Fair Political Practices Commission (FPPC) asking for formal advice as to whether the Fairfax Open Space Committee (FOSC) members should be added to the "Designated List" – a list of those positions required to file a Form 700. The FPPC responded with the attached letter, advising that the Political Reform Act does require FOSC members to file Form 700 because the committee possesses decision-making authority.

Staff is recommending that the Council adopt the resolution to add FOSC members to the list of designated positions (Form 700 filers). The members would be required to file a Form 700 within 30 days of the effective date of the amended conflict of interest code.

FISCAL IMPACT

None

ATTACHMENTS

1. January 31, 2017 letter from the FPPC
2. Resolution



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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January 31, 2017

Janet Coleson
BEST BEST & KRIEGER LLP
Town Attorney
Town of Fairfax
2001 N. Main Street, Suite 390
Walnut Creek, CA 94596

Re: Your Request for Advice
Our File No. A-16-241

Dear Ms. Coleson:

This letter responds to your request for advice regarding the conflict of interest provisions of the Political Reform Act (the "Act").¹ This letter should not be construed as assistance on any conduct that may have already taken place (Regulation 18329(c)(4)(A)), and is based on the facts presented. The Fair Political Practices Commission (the "Commission") does not act as a finder of fact when it provides advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) 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 Government Code Section 1090.

QUESTION

Does the Act require the members of the Fairfax Open Space Committee (the "FOSC") of the Town of Fairfax ("Town") to file annual Statements of Economic Interests ("SEIs")?

CONCLUSION

Yes. As explained below, the Act requires the members of the FOSC to file SEIs because it possesses decisionmaking authority.

FACTS

You are the Town Attorney seeking advice on behalf of the Town regarding whether the members of the FOSC are required to file annual SEIs. We take the following facts verbatim from your letter:

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 18110 through 18997 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.

The Town Council of the Town of Fairfax created the seven member Fairfax Open Space Committee ("FOSC" or "the Committee") in 2004 (Resolution 2323), increased the membership to eleven members that same year (Resolution 2334), then set the terms for the members in 2008 (Resolution 2528), allowed individuals who resided outside of the Town limits but within the Town's Zip Code to be appointed as members in 2010 (Resolution 10-47), adopted criteria for protecting open space in 2011 (Resolution 11-54), set four year terms for members of the Committee in 2012 (Resolution 12-45), and reduced the membership of the Committee from eleven members to nine members in 2015 (Resolution 15-47). Currently, the FOSC is comprised of nine members. Members include Town residents and those who reside outside of Town limits but within the 94930 zip code.

The goal of the FOSC is to provide open space, and its mission is to preserve the visual and environmental values of the Fairfax community through the preservation and acquisition of undeveloped land in and around Fairfax. Resolution 2528 provides that the FOSC has responsibility for the consideration of long term planning of open space in and around Fairfax, for the generation of community support for the implementation of that open space program, and for the fundraising necessary to implement the open space plan. The Resolution provides that the FOSC "is an advisory body to the Town Council and its role is to advocate for open space." The Resolution further provides that the Committee "may involve itself as an advisory body in the consideration of the long-term planning of the Town and may review planning and development matters in order to formulate policy it deems appropriate to advocate." The FOSC also surveys the lands within and adjacent to the Town to determine the availability of unique threatened, or environmentally sensitive land that may be appropriate to hold in perpetuity as dedicated open space for the public.

Since its formation in 2004, the FOSC has considered and recommended a number of items to the Town Council. The Town Clerk recently reviewed the Town Council minutes since the formation of the FOSC and could not find an instance where the Town Council did not accept FOSC's recommendations. For example, the FOSC in August 2006 recommended the adoption of an Open Space Management Plan, which was approved by the Town Council. In April 2007, the FOSC recommended Council approval of the designation of a particular piece of property as a priority for the acquisition of open space. The Town Council accepted and approved of this recommendation. In July 2009, the FOSC recommended that the Town Council authorize the purchase of two tax defaulted properties, and the Town Council directed staff to assist the FOSC in purchasing the properties. In September 2012, the FOSC asked the Town Council to accept the donation of property, which the Town Council did via resolution. As a final example, in 2013, the FOSC recommended the proposed terms of an option agreement for the purchase of real property and for the acceptance of a donation of real property due to properties' desirability

as open space and as public access ways to adjacent publicly owned ridgetop lands.² The Town Council accepted this recommendation.³

Further, the Town's General Plan's open space element specifically calls for the involvement and role of the FOSC with regards to the Town's open space. Under the General Plan, the FOSC is charged with the creation of an inventory of undeveloped and underdeveloped lands within the Fairfax Planning Area. The inventory "shall become a part of the General Plan." The FOSC is then charged with prioritizing the parcels in the inventory so that the parcels that "most significantly contribute to the objectives of the Open Space, Conservation, and Land Use elements are easily identified." If a parcel is later proposed for development, the FOSC, in addition to the Planning Commission and the Town Council, shall review the proposal. For parcels proposed for development, FOSC is required to submit a report regarding Open Space to the Planning Commission. Finally, the General Plan provides that if high priority parcels on the inventory are to be sold for sale or auction, the Planning Commission and the Council "shall" consider allocating funds from any available sources to acquire the property and create additional designated open space. The Town is committed to acquiring and encouraging the acquisition of appropriate easements on parcels in the inventory, which permit the property owner to retain ownership but give up development rights.

One of the Town's current Council members served on FOSC for a number of years and believes, however, that FOSC's recommendations may not be fairly characterized as "consistently accepted" by the Town Council. She points out that there are instances pertaining to Open Space where the Committee had a limited role or no role at all in the Council's determinations and even instances where the Council rejected the Committee's recommendations. These include a lawsuit filed in 2008 by the Town against a property owner who had locked a gate across what the Town believed to be a public easement. The Town lost the suit in the trial court and filed an appeal, which the Town ultimately lost. The Committee had no involvement in the Council's decision to file the lawsuit or the appeal.

An example where the Council did not accept the Committee's recommendation involves the development of materials for an application to the Association of Bay Area Governments (ABAG) for a Priority Conservation Area grant. In early 2015 FOSC submitted the grant application with supporting documentation to the Town Council. After discussion, the Council did not accept the package as submitted and instead, requested substantive revisions of FOSC.

² The member of FOSC who led this matter is a land use attorney who, in his employment, works on open space acquisition for the State of California.

³ A Councilmember has requested we point out that these examples may reflect that the Council appoints members to the Committee who will represent the Town on open space matters effectively and/or that their rationale supporting these decisions was wholly adequate.

The Committee revised the application and after a second discussion, the Council accepted the revisions and directed the Town Manager to complete the application process and submit the package to ABAG.

A final example of FOSC not playing a lead role in Open Space issues is the acquisition of Sky Ranch. While FOSC had a significant role in fundraising efforts for the purchase of a 16-acre open space parcel that is located partially in the Town, the Sky Ranch Committee was comprised of a Marin County Supervisor, two Fairfax Council members, a member of the Marin Open Space Trust, and a member of FOSC.

ANALYSIS

The Act's conflict of interest provisions ensure that public officials will "perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests of persons who have supported them." (Section 81001(b).) Section 87100 thus prohibits any public official from making, participating in making, or otherwise using his or her official position to influence a governmental decision in which the official has a financial interest.

In furtherance of this prohibition, the Act requires every state and local government agency to adopt a conflict of interest code. (Section 87300.) A conflict of interest code enumerates the positions within the agency that make or participate in making decisions that may have a foreseeable and material effect on any financial interest. (Section 87302(a).) A "designated employee" includes any "officer, employee, member, or consultant" of an agency whose position involves making or participating in making decisions which may have a foreseeable material effect on any financial interest. (Section 82019(a)(3).) A "designated employee" does not include an unsalaried member of any board or commission that serves a solely advisory function. (Section 82019(b)(1).) Section 87302(a) requires the conflict of interest code to specify the economic interests a designated employee must report on his or her SEIs. And Section 87302(b) requires a designated employee to file SEIs at times and under circumstances as specified.

A conflict of interest exists whenever a public official makes, participates in making, or uses his or her official position to influence a governmental decision that has a reasonably foreseeable material financial effect on one or more of his or her interests specified in Section 87103. A public official is subject to the Act's conflict of interest provisions and financial disclosure requirements. (*Haggerty* Advice Letter, No. A-15-018; *Haughy* Advice Letter, No. I-13-122; *Rosskopf* Advice Letter, No. A-89-709.)

The threshold inquiry in determining if the Act requires the members of the FOSC to file SEIs is whether those members are "public officials" who will be making, participating in making, or influencing a governmental decision. Section 82048 defines "public official" as every member, officer, employee or consultant of a state or local government agency. For the purpose of further defining "public official," Regulation 18701(c)(2) defines "member" as follows:

(2) "Member" does not include an individual who performs duties as part of a committee, board, commission, group, or other body that does not have decisionmaking authority.

(A) A committee, board, commission, group, or other body possesses decisionmaking authority whenever:

(i) It may make a final governmental decision;

(ii) It may compel or prevent a governmental decision either by reason of an exclusive power to initiate the decision or by reason of a veto that may not be overridden; or

(iii) It makes substantive recommendations and, over an extended period of time, those recommendations have been regularly approved without significant amendment or modification by another public official or governmental agency.

(B) A committee, board, commission, group, or other body does not possess decisionmaking authority if it is formed or engaged for the sole purpose of researching a topic and preparing a report or recommendation for submission to another public official or governmental agency that has final decisionmaking authority, and does not meet any of the criteria set forth in subsection (2)(A)(i-iii).

Thus, a committee, board, or commission may be deemed to have decisionmaking authority whenever it has the ability to (1) make a final decision, (2) compel or prevent a decision, or (3) make substantive recommendations that are, over an extended period, regularly approved without significant amendment or modification. If the FOSC has decisionmaking authority under any of these tests, its members would be considered public officials who must file SEIs. Alternatively, if the FOSC does not have decisionmaking authority, its members are not considered public officials under the Act and are not required to file SEIs as a result of their membership on the FOSC.

According to your facts, the FOSC is a nine-member advisory body to the Town Council whose goal is to provide open space in order to preserve the visual and environmental values of the Fairfax community through the preservation and acquisition of undeveloped land. You have provided numerous examples of instances, dating back to 2006, where FOSC advice concerning open space matters were consistently accepted, without significant amendment or modification, by the Town Council. In fact, you stated that a recent search of Town Council minutes (dating back to the formation of the FOSC) by the Town Clerk failed to reveal any instance where the Town Council did not accept the FOSC's recommendations.

A former member of the FOSC stated, however, that there was at least one instance relating to a grant application where the Town Council did not accept the FOSC recommendation. There, after reviewing a package submitted by the FOSC, the Town Council requested substantive revisions to the application. The FOSC revised the application and the Town Council ultimately accepted the revisions. The rejection of a single grant application, however, does not negate the fact that the Town Council has approved what appears to be every other FOSC recommendation since its formation in 2004. And this fact is not diminished by the claim that the FOSC may have had a limited role or no role in certain open space matters. The present inquiry is solely concerned with Town Council actions taken with respect to FOSC recommendations.

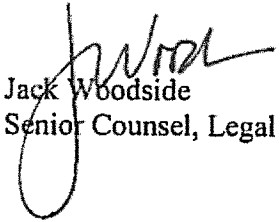
It has been suggested by a current Town Council Member that the repeated approvals of FOSC recommendations may well reflect that the Town Council appoints members to the FOSC who will effectively represent the Town on open space matters. Whether or not this is the case, we conclude, based on the facts presented, that the FOSC has decisionmaking authority because it makes and has made substantive recommendations that are regularly approved by the Town Council without significant amendment or modification over an extended period of time.

Accordingly, the FOSC members are public officials engaged in decisionmaking under the Act, the FOSC must adopt a conflict of interest code or be included within the Town's code, and FOSC members must file SEIs as required.

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

Sincerely,

Hyla P. Wagner
General Counsel

By: 
Jack Woodside
Senior Counsel, Legal Division

JW:jgl

RESOLUTION 17-__

**A RESOLUTION OF THE TOWN COUNCIL OF THE TOWN OF FAIRFAX
AMENDING THE CONFLICT OF INTEREST CODE FOR THE TOWN OF FAIRFAX
TO INCLUDE MEMBERS OF THE FAIRFAX OPEN SPACE COMMITTEE ON THE LIST OF
DESIGNATED POSITIONS**

WHEREAS, the Political Reform Act (Government Code Section 81000 et seq.) requires local government agencies to adopt and promulgate conflict of interest codes, and to conduct a biennial review and revise them if necessary; and

WHEREAS, the Fair Political Practices Commission (FPPC) has adopted a regulation (2 Cal. Code of Regs. 18730) which contains the terms of a standard conflict of interest code which may be incorporated by reference in an agency's code, and which may be amended by the FPPC to conform to amendments in the Political Reform Act, following public notice and hearings; and

WHEREAS, the terms of 2 Cal. Code of Regs. 18730 and any amendment to it duly adopted by the FPPC have previously been incorporated by reference by Section 2.48.010 of the Town Code, which, together with the list of designated positions and disclosure categories adopted from time to time by the Town Council (the "Designated List") constitutes the Conflict of Interest Code for the Town of Fairfax; and

WHEREAS, the Town in its review of the current Conflict of Interest Code, which the Town last updated in 2016 pursuant to Resolution 16-22, sought an advice letter from the FPPC regarding whether to include members of the Fairfax Open Space Committee (FOSC) on the Designated List; and

WHEREAS, the FPPC issued an advice letter to the Town indicating that members of FOSC make or participate in making governmental decisions that may foreseeably have a material effect on any financial interest, and therefore they should be included in the Designated List; and

WHEREAS, the Town now wishes to revise the Designated List as per the attached "Exhibit A" in order to reflect the addition of members of FOSC thereto;

WHEREAS, the designated employees, officials and consultants on the revised Designated List shall file statements of economic interests with the Town of Fairfax and the Town shall make all statements available for public inspection and reproduction, pursuant to Government Code Section 81008;

NOW, THEREFORE, BE IT RESOLVED, that the Town Council hereby adopts the revised Designated List attached hereto as "Exhibit A" to replace all prior designations of positions and disclosure categories of the Town of Fairfax Conflict of Interest Code pursuant to Section 2.48.010 of the Town Code.

The Foregoing Resolution was adopted at a regular meeting of the Town Council of the Town of Fairfax held in said Town on March 1, 2017, by the following vote, to wit:

AYES:
NOES:
ABSENT:

John Reed, Mayor

Attest: _____
Michele Gardner, Town Clerk

Exhibit "A"

Designated List of the Conflict of Interest Code
(Chapter 2.48 of the Town of Fairfax)

DESIGNATED OFFICIALS

	<u>Form</u>	<u>Disclosure Category</u>
Parks and Recreation Commission	700	1, 2, 3
Planning and Building Services Director	700	1, 2, 3
Director of Public Works	700	1, 2, 3
Building Official	700	1, 2, 3
Finance Director	700	1, 2, 3
Police Chief	700	1, 2, 3
Town Clerk	700	1, 2, 3
Assistant to the Town Manager	700	1, 2, 3
Town Engineer	700	1, 2, 3
Senior Planner	700	1, 2, 3
Principal Planner	700	1, 2, 3
Management Analyst	700	1, 2, 3
Open Space Committee	700	1, 2, 3
Consultant**	700	1, 2, 3
(Subject to Town Manager Discretion)		

(Any employee serving dual roles may file a combined statement by reporting the broadest range of disclosure.)

** A Consultant is defined as a person who provides under contract, information, advice, recommendation or counsel to any agency. Consultant shall be included in the list of designated employees and shall disclose pursuant to the broadest disclosure category subject to the following limitations:

The Town Manager may determine in writing that a particular consultant, although a "designated position," is hired to perform a range of duties that is limited in scope and thus is not required to fully comply with the disclosure requirements described in this section. Such written determination shall include a description of the consultant's duties and, based upon the description, a statement of the extent of disclosure requirements. The Town Manager's determination is a public record and shall be retained for public inspection in the same manner and location as this conflict of interest code.

PUBLIC OFFICIALS WHO FILE A STATEMENT OF ECONOMIC INTERESTS PURSUANT TO GOVERNMENT CODE §87200:

	Form	Disclosure Category
Town Council	700	1, 2, 3
Planning Commission	700	1, 2, 3
Town Manager	700	1, 2, 3
Town Attorney	700	1, 2, 3
Town Treasurer	700	1, 2, 3

DISCLOSURE CATEGORIES

1. Investments and business positions in any business entities which, within the last two years, have contracted, or plans to do business in the jurisdiction, with the Town to provide services, supplies, materials, machinery, or equipment.

2. Income from any other source which, within the last 12 months, has contracted, or plans to do business in the jurisdiction, with the Town to provide services, materials, machinery or equipment to the Town.

3. Interests in real property, located in whole or in part either within the boundaries of the Town, or within two miles of the boundaries of the Town, including any leasehold, beneficial or ownership interest or option to acquire such interest in real property. This information need not be provided with respect to an interest in real property that is used as the principal residence of the designated member or employee

DISCLOSURE CATEGORY REQUIREMENTS

Broadest Disclosure per Applicable Requirement (Form 700) including:

- All sources of income, and
- Interest in Real Property, and
- Investments and Business positions in business entities.

DESIGNATED CONSULTANT POSITIONS

The Town Manager has determined that the following Consultant positions are “designated positions” required to file a statement of economic interests pursuant to Chapter 2.48 of the Town Code, as indicated:

- Planning Consultants
- Engineering Consultants