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Office of the City Attorney

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Via U.S. Mail and Email to leguladvice@sppc.ca.gov

State of California
Fair Political Practices Commission
Legal Division
428 J Street, Suite 620
Sacramento, CA 95814
Telephone: (916) 322-5660
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RE: Conflict of Interest Opinion Request

Dear Sir or Madam:

The City Attorney's Office of the City of Capitola ("City") is writing to request written advice from the Fair Political Practices Commission. In particular, the City is seeking advice with respect to the following issue:

May a Councilmember participate in the decision to approve or deny an application (and associated permits) for a skate-park project when the Councilmember recently received income for the performance of electrical work from the expected primary donor of the subject project and such expected donor may be indirectly connected to the applicants?

Capitola City Councilmember Michael Termini is the president and sole shareholder of Triad Electric, Inc., a closely held California corporation which conducts electrical contracting work ("Triad Electric"). Triad Electric contracts and subcontracts for electrical installations on construction projects and also contracts to perform electrical repair and maintenance work on existing structures. Councilmember Termini is a current member of the Capitola City Council (and has been a member of such City Council since December 2004).

The City is processing a privately initiated application to construct an approximately 6,000 square-foot skate park, consisting of a concrete bowl-shaped center with ramps and jump features, proposed to be located in Monterey Park, a neighborhood park owned by the City ("Project"). The Project applicants are Tricia Proctor and Marie Martorella ("Applicants"). A Draft Environmental Impact Report (EIR) for the Project has been completed and is currently open to public review and

comment. The public review period ends January 8, 2016. The Project will require approval of a design permit, conditional use permit, and a coastal development permit from the Planning Commission. Planning Commission decisions may be appealed to the City Council. A right-of-entry permit would also need to be approved by the City Council. It is anticipated that the Planning Commission hearing on the Project will occur in March, 2016 and the City Council hearing will be held in April 2016.

If approved, the City and Applicants would enter into an agreement whereby Applicants would construct (using properly licensed contractors) the Project on the Monterey Park site, possibly via a lease-leaseback arrangement. The contractor(s) for the Project have not yet been selected.

While the Applicants are the specified individuals (i.e. Ms. Proctor and Ms. Mortorella), such individuals appear to be indirectly linked to NHS, Inc., a California corporation ("NHS"), and its owner Richard Novak.

- One of the Project Applicants, Tricia Proctor, is the niece of Mr. Novak and an employee of NHS.
- NHS provided the deposits for the Project, in the amounts of approximately \$40,000 (initial deposit) and \$20,000 (subsequent deposit) ("Deposits").

Moreover, NHS, among others, has informally committed to finance the planning and construction of the Project. Such commitments were not made at the behest of any City Councilmember. At this point in time, NHS is expected to be the primary private donor for the Project. However, the Applicants are seeking donations from other sources in the community; therefore, it is unclear the full extent of NHS' ultimate donations to and involvement in the Project as it proceeds.

Recently, in September 2015, Triad Electric performed electrical work for NHS. All of the Triad Electric invoices have been satisfied by NHS and, accordingly, in 2015, NHS has been a source of income to Triad Electric in the sum of approximately Seventeen Thousand Dollars (\$17,000).

Per the conflict of interest provisions of the Political Reform Act, "[n]o public official at any level of state or local government shall make, participate in making or in any way make use of his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest." (Government Code Section 87100). The general rule, however, is that a conflict of interest exists whenever a public official makes a governmental decision that has a reasonably foreseeable material financial effect on one or more of his or her financial interests. Different standards apply to determine whether a reasonably foreseeable financial effect on an interest will be material depending on the nature of the interest. Interests from which a conflict of interest may arise are specified in Section 87103, and those pertinent to the present circumstances include:

- **Business Entity:** A public official has an interest in a business entity in which he or

she has a direct or indirect investment of \$2,000 or more (Cal. Gov. Code § 87103(a); CCR §18700(c)(6)(A)); or in which he or she is a director, officer, partner, trustee, employee, or holds any position of management. (Cal. Gov. Code § 87103(d); CCR §18700(c)(6)(D)).

- **Source of Income:** A public official has an interest in any source of income, including promised income, totaling \$500 or more within 12 months prior to the decision. (Cal. Gov. Code § 87103(c); CCR §18700(c)(6)(C)).
- **Personal Finances:** A public official has an economic interest in his or her personal finances, including those of his or her immediate family. (Cal. Gov. Code §87103).

Councilmember Termini has an interest in his business, Triad Electric, as an owner and officer, and as a source of income. Councilmember Termini also has a potential economic interest in NHS, as a source of income.¹ The issue is whether the effect on these interests from decisions regarding the Project will be reasonably foreseeable and material.

Councilmember Termini's interests are not explicitly involved in decisions relating to the Project application because Triad Electric and NHS are not the Project applicants or otherwise named parties in or the subject of the decisions (unless the Applicants were considered to be representatives of NHS or NHS was otherwise considered to be the de facto applicant). (See CCR §18701(a)). Where the interest is "not explicitly involved" in the decision, a financial effect is reasonably foreseeable if the effect can be recognized as a realistic possibility and more than hypothetical or theoretical. A financial effect need not be likely to be considered reasonably foreseeable. (CCR §18701(b)).

At the present time, it appears that decisions regarding the Project will not have a reasonably foreseeable financial effect on Councilmember Termini's financial interest in his business, Triad Electric, as Triad Electric is not involved or invested in the Project and does not anticipate receiving any advantage or disadvantage as a result of such decisions. However, it is conceivable that decisions regarding the Project may have a financial effect on NHS (one of Triad Electric and Councilmember Termini's sources of income in 2015) as NHS is expected to be one of the primary donors to the Project should it proceed. Moreover, the Deposits NHS submitted as part of the application process will be applied to the Project costs. It remains to be seen whether such financial effect is material.

A conflict of interest may arise only when a reasonably foreseeable financial effect of a governmental decision on a public official's economic interest is material. (See CCR §18700(a)). With respect to sources of income that are business entities, such as NHS, the materiality standard is provided in Regulation Section 18702.3. Under this standard, for income received from the official for goods and services provided in the ordinary course of business, the financial effect is material if:

¹ Income of an individual includes a pro rata share of the income of a business entity in which the individual owns, directly, indirectly, or beneficially, a 10 percent interest or greater. (Cal. Gov. Code §82030(a).) Thus, customers or clients of Councilmember Termini's business, Triad Electric, who are sources of income to his businesses are also considered sources of income to him to the extent that his share of the income will be \$500 or more.

(1) The source is a claimant, applicant, respondent, contracting party, or is otherwise named or identified as the subject of the proceeding; or

...

(4) The source is a business entity that will be financially affected under the standards as applied to a financial interest in Regulation 18702.1.

In addition, any reasonably foreseeable financial effect on a source of income is "deemed material if the public official receives or is promised the income to achieve a goal or purpose which would be achieved, defeated, aided, or hindered by the decision." CCR §18702.3(c).

As discussed above, NHS is not the applicant or otherwise named or identified as the subject of the application. Moreover, there does not appear to be any "nexus" between Councilmember Termini's duties to NHS (as a client) and duties to the City. The electrical work Triad Electric performed for NHS was a singular, discrete project that was completed in September 2015. Triad Electric (and Councilmember Termini) has no ongoing obligations or commitments to NHS and Triad Electric does not anticipate any income from NHS relating to Project decisions.

Thus, we look to Regulation 18702.1 to determine whether the financial effect of the decision is material. Regulation 18702.1 provides, in pertinent part, that the financial effect of a governmental decision on a business entity is material whenever the business entity:

(1) Initiates the proceeding in which the governmental decision will be made by filing an application, claim, appeal, or request for other government action concerning the business entity;

(2) Offers to make a sale of a service or a product to the official's agency;

(3) Bids on or enters into a written contract with the official's agency;

(4) Is the named manufacturer in a purchase order of any product purchased by the official's agency or the sales provider of any products to the official's agency that aggregates to \$1,000 or more in any 12-month period;

(5) Applies for a permit, license, grant, tax credit, exception, variance, or other entitlement that the official's agency is authorized to issue;

(6) Is the subject of any inspection, action, or proceeding subject to the regulatory authority of the official's agency; or

(7) Is otherwise subject to an action taken by the official's agency, the effect of which is directed solely at the business entity in which the official has an interest.

...

None of the foregoing appear to currently apply to NHS. For a governmental decision not identified in the above list, Regulation 18702.1(b) provides that "the financial effect is material if a prudent person with sufficient information would find it is reasonably foreseeable that the decision's financial effect would contribute to a change in the price of the business entity's publicly traded stock, or the value of a privately-held business entity."

NHS is a manufacturer and distributor that has been in business since 1973. NHS' main products include skateboard decks, trucks, wheels, snowboards and surfboards, and related products, apparel and accessories. NHS' brand names include Santa Cruz Skateboards, Creature and Sonic Skateboards, Independent and Krux Trucks, Speed Wheels, Santa Cruz Classics, Titus Safety Gear, Santa Cruz Snowboards and Combine Snowboard Clothing. NHS distributes products worldwide. NHS is the one of the oldest company in the world dedicated to selling skateboards. It is unlikely that the development of a skate park in the City will contribute to the change in the value of NHS. Arguably, NHS' involvement in the skate park Project as a donor could generate additional good will to NHS and potentially increase local skateboard sales. However, such possible effects appear to be speculative at this juncture.

In sum, NHS is not the applicant or subject of the Project application. NHS is a private donor whose business value does not appear to be linked to the approval and/or construction of the Project. Other than the Deposits already made, NHS has not pledged any specific amounts to the Project. While it is likely that NHS will be one of the primary donors, the Applicants will be seeking additional contributions and donations for the Project from other businesses and members of the community.

In light of the foregoing, we would appreciate the FPPC's legal opinion as to whether Councilmember Termini may participate in City Council deliberations and decisions relative to the subject Project or has a conflict of interest that would prevent him from participating in such activities.

If you require further information from this office relative to this opinion request, please feel free to contact me at (831) 423-8383 or hlenhardt@abc-law.com. The City of Capitola and Councilmember Termini sincerely appreciate your assistance with regard to this inquiry.

Very truly yours,



Heather J. Lenhardt
Deputy City Attorney

HJL

Cc: Mayor
Councilmember Michael Termini
Jamie Goldstein, City Manager