

State of California



Fair Political Practices Commission

P.O. BOX 807 • SACRAMENTO, 95804 ••• 1100 K STREET BUILDING, SACRAMENTO, 95814

Technical Assistance •• Administration •• Executive/Legal •• Enforcement
(916) 322-5662 322-5660 322-5901 322-6441

July 2, 1985

SUPERSEDED

in part by: 93-297

Robert L. Felts
Principal Attorney
Office of the County Counsel
County of Tulare
Courthouse, Room 204
Visalia, CA 93291

Re: Your Request for Advice on
Behalf of Tulare County
Supervisor LeRoy Swiney
Our File No. A-85-130

Dear Mr. Felts:

You have written requesting advice on behalf of Tulare County Supervisor LeRoy Swiney. You have presented the following facts.

FACTS

Mr. Swiney is currently a real estate agent for a real estate brokerage firm (Newton Real Estate) in Dinuba, Tulare County. In this capacity, Mr. Swiney has received several listings to sell from a local landowner, William Morris. To date, Mr. Swiney has not received any offers from prospective buyers on any of the listings, and he has received no income as a result of any transaction with Mr. Morris within the past 12 months.

Prior to becoming a real estate agent for Newton Real Estate, Mr. Swiney participated in a decision of the Board of Supervisors relative to a land use plan amendment that included other lands owned by William Morris. This land was not a part of the listings and is removed from the area in which Newton Real Estate normally provides services.

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It is anticipated that the Board of Supervisors will have under consideration a proposal submitted by the landowner for development of the same land. It is your understanding that Mr. Swiney believes that he should participate in such consideration.

QUESTION

You have asked the following question:

Based upon the foregoing, please give us your opinion as to whether Mr. Swiney may participate as a member of the Board in the forthcoming consideration. He intends to relinquish any interest in the listings he has received. Further, he requests your advice with regard to whether or not the broker with whom Mr. Swiney is engaged should retain the listings.

ANALYSIS

Under the conflict of interest provisions of the Political Reform Act (the "Act"),^{1/} Mr. Swiney, as a public official, must refrain from making, participating in making, or using his official position to influence the making of any governmental decision in which he has a financial interest. Section 87100. An official has a financial interest in a decision if it will directly impact upon the official's own pocketbook or if it will impact upon one of the economic interests enumerated in Section 87103:

An 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:

* * *

(c) Any source of income, other than gifts and other than loans by a commercial lending institution in the regular course of business on terms available

^{1/} Government Code Sections 81000-91015. All statutory references are to the Government Code unless otherwise specified.

to the public without regard to official status, aggregating two hundred fifty dollars (\$250) or more in value provided to, received by or promised to the public official within 12 months prior to the time when the decision is made.

With respect to income which is derived from various types of commissions earned for sales or other activities, the Commission has adopted a regulation to clarify who is the source of such income. With respect to real estate sales agents, 2 Cal. Adm. Code Section 18704.3, provides as follows:

(a) This section contains the disclosure and disqualification requirements for any public official who receives commission income for services rendered as an insurance broker or agent, a real estate broker or agent, a travel agent or salesperson, a stockbroker or a retail or wholesale salesperson.

(b) "Commission income" means gross payments received as a result of services rendered as a broker, agent, or other salesperson for a specific sale or similar transaction. Commission income is received when it is paid or credited.

(c) The sources of commission income in a specific sale or similar transaction include for each of the following:

* * *

(3) A real estate agent:

(A) The broker and brokerage business entity under whose auspices the agent works;

(B) The person the agent represents in the transaction; and

(C) Any person who receives a finder's or other referral fee for referring a party to the transaction to the broker, or who makes a referral pursuant to a contract with the broker.

As can be seen from the above, Mr. Morris would become a source of income to Mr. Swiney as a result of any sale of Mr. Morris' property. The income would be "received" when the

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commission was "paid or credited." However, Section 87103(c) includes not only income which has been "received" but also income which has been "promised" within the preceding 12 month period.

In our letter to Stanley Remelmeyer, No. A-81-510, we advised that a real estate agent who had a single listing from a seller was not "promised" income by the seller until he had secured a buyer. Prior to that time the expectation of receipt of income is too speculative to rise to the level of "promised" income. However, the income has been earned once the sale has been consummated even though escrow has not yet been opened and no money has changed hands. At that point, the income has been "promised" for purposes of Section 87103(c).

We have had occasion to apply this concept to the situation of an attorney who had taken a case on a contingency fee basis. In that situation, we have said that: absent unusual circumstances, a contingency fee contract would constitute "promised" income within the meaning of Section 87103(c) because attorneys normally take contingency fee cases with the expectation of receiving some fee of \$250 or more.

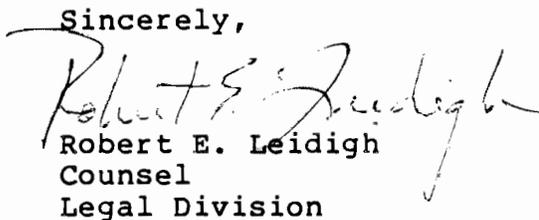
In Mr. Swiney's case, he has not just one sales listing, but several from Mr. Morris. While a single listing does not give rise to a strong expectation of eventual commission income, several listings may, together, give rise to the strong prospect of future income from a client. Under these circumstances, we think that Mr. Swiney has elected to pursue the wisest course of conduct by relinquishing the listings so that he will derive no income personally from any sales arising from the properties in question. Once he has relinquished any right to receive any income from Mr. Morris there can be no "promised" income and Mr. Swiney will be free to participate in the upcoming decision.

With respect to the second question posed by your request, as to whether the retention of the listings by Newton Real Estate is permissible, as long as Mr. Swiney will derive nothing from the sales and since he is not an owner of 10 percent or more of Newton Real Estate, there is no basis for a need to disqualify in this situation. Because Newton Real Estate is a source of income to Mr. Swiney, any decisions which would affect Newton Real Estate could require disqualification, but that is not the circumstance here.

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Should you or Mr. Swiney have any questions regarding this letter, please do not hesitate to contact me at (916) 322-5901.

Sincerely,



Robert E. Leidigh
Counsel
Legal Division

REL:plh
cc: Supervisor Swiney

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May 30, 1985

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Mr. Bob Leidigh
Fair Political Practices Comm.
P. O. Box 807
Sacramento, CA 95804

Re: Request for Advice Letter

Dear Mr. Leidigh:

After his conversation with you, Board of Supervisors Member LeRoy Swiney asked that I request of you an advice letter with regard to his participation in the land use matter we previously discussed.

As we discussed, Mr. Swiney is presently engaged as a real estate agent with a real estate firm in Dinuba. In this capacity, Mr. Swiney received certain listings to sell from a local landowner. Mr. Swiney has not received an offer from a prospective buyer on any of the listings, and he has received no income as a result of any transaction with the landowner within the past twelve months.

Prior to becoming involved as a real estate agent, Mr. Swiney participated in a decision of the Board of Supervisors relative to a land use plan amendment that included land owned by the landowner in question. This land was not a part of the listings and is removed from the area in which the realty firm normally provides services. It is anticipated that the Board will have under consideration a proposal submitted by the landowner for development of the same land. It is my understanding that Mr. Swiney believes that he should participate in such consideration.

Mr. Bob Leidigh
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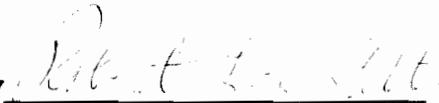
Based upon the foregoing, please give us your opinion as to whether Mr. Swiney may participate as a member of the Board in the forthcoming consideration. He intends to relinquish any interest in the listings he has received. Further, he requests your advice with regard to whether or not the broker with whom Mr. Swiney is engaged should retain the listings.

If you require any further information, please inform us.

Thank you for your consideration. We anticipate that the Board will have this matter under consideration within the next few weeks.

Very truly yours,

LITA O'NEILL BLATNER
County Counsel

By 
Robert L. Felts
Principal Attorney

RLF/pc
D/79
cc: Supervisor Swiney