



California Fair Political Practices Commission

January 14, 1987

Linda Somers
Kronick, Moskowitz, Tiedemann & Girard
770 L Street, Suite 1200
Sacramento, CA 95814-3363

Re: Your Request for Advice
Our File No. A-86-332

Dear Ms. Somers:

You have requested advice on behalf of Modesto City School Board Member Donna Thayer. This letter will confirm the advice provided during our telephone conversation of December 31, 1986.

QUESTIONS

1) Is Ms. Thayer required to disqualify herself from voting on a proposal to impose a school development fee on developers as a condition to their obtaining building permits?

2) If so, must she disqualify herself from participating in school board deliberations over the school development fee proposal?

3) Must she also refrain from participating in other discussions with school board members regarding the proposed development fee?

CONCLUSIONS

1) Ms. Thayer must disqualify herself from voting on the proposed fee if the decision will have a reasonably foreseeable material financial effect on the land development corporation owned by Ms. Thayer and her husband. If the Building Industry Association has been a source of income to Ms. Thayer of at least \$250 within the 12 months preceding the vote, she must disqualify herself because of the nexus which exists between the purpose for which she receives the income and the governmental decision.

2) If Ms. Thayer must disqualify herself from voting, she must also disqualify herself from participating in and, thereby, attempting to influence, the board's deliberations.

3) Ms. Thayer must also refrain from other discussions in which she attempts to influence the board members regarding their decision.

FACTS

The Modesto City School Board expects to vote on a proposal which would require residential, commercial and industrial developers to pay a school development fee as a condition precedent to obtaining building permits.^{1/}

School board member Donna Thayer and her spouse are the sole owners and shareholders of a California corporation which develops land for residential, commercial and industrial use. Ms. Thayer is the sales and marketing director for the corporation. The corporation, James Thayer, Inc. (doing business as Oakwood Builders, Inc.), owns both developed and undeveloped land within the jurisdiction of the Modesto City School District. This property currently includes three residential developments containing tracts of 50 to 100 homes. The corporation sells each home directly to the buyer and intends to develop additional property within the school district in the forthcoming year. Building permits will be a necessary part of this development.

School board member Thayer is also a board member of the Building Industry Association of Central California ("BIA"). Ms. Thayer's husband, James, is president of this local group. BIA is a chapter of the California Building Industry Association and a member of the National Association of Home Builders. As such, BIA engages in legislative advocacy for the building industries. During our communication on December 31, you advised me that BIA has taken a position regarding the school development fee issue. California Building Industry Association has advised me by telephone that their organization is nonprofit.

ANALYSIS

Modesto School board member Donna Thayer is a public official. (Government Code Section 82048.) As such, the Political Reform Act (the "Act")^{2/} requires that she not participate in any governmental decision in which she has a financial interest. (Section 87100.) Ms. Thayer has a

^{1/} This vote was scheduled to occur on January 2, 1987.

^{2/} Government Code Sections 81000-91015. All statutory references are to the Government Code unless otherwise indicated. Commission regulations appear at 2 California Administrative Code Section 18000, et seq. All references to regulations are to Title 2, Division 6 of the California Administrative Code.

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financial interest in a decision if it will have a reasonably foreseeable material financial effect, distinguishable from the effect on the public generally, on:

(a) Any business entity in which the public official has a direct or indirect investment worth one thousand dollars (\$1,000) or more.

* * *

(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 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.

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

(Section 87103(a), (c), (d).)

A) James Thayer, Inc. (dba Oakwood Builders, Inc.)

Based upon the nature and activity of James Thayer, Inc., we will assume that Ms. Thayer's investment interest is equal to or exceeds \$1,000. Accordingly, she must disqualify herself if the decision on the development fee would result in a reasonably foreseeable material financial effect on the corporation.

For purposes of the Act, Ms. Thayer's share of the corporation's income is her (joint) 100% share of its gross revenues. (Section 82030(a); see Carey Opinion, 3 FPPC Opinions 99 (No. 76-087, Nov. 3, 1977) and Advice Letter to Allen Sprague (No. A-86-260) (copies enclosed).) Although you have not stated the amount of this income, we will assume, based upon the corporation's activities, that she has received at least \$250 within the 12 months preceding the decision. This source of income would be another basis for disqualification if the reasonably foreseeable financial effect on the Thayer corporation is material.

In addition to the above economic interests, Donna Thayer is a partner in James Thayer, Inc., and holds a position of management. This interest provides a third basis for

disqualification if the standards of foreseeability and materiality are met. An effect is reasonably foreseeable if there is a "substantial likelihood" that it will occur. Certainty is not required; however, if the effect is but a "mere possibility," it is not considered reasonably foreseeable. (Thorner Opinion, 1 FPPC Ops. 198 (No. 75-089, Dec. 4, 1976, copy enclosed.)

The standards for determining whether the effect of a governmental decision on a business entity are material are set forth in Regulation 18702.2. The appropriate standard depends on the size and qualifications of the business entity. Since Mr. and Mrs. Thayer are the sole owners and shareholders of the corporation, we will assume that the standard for small business entities is applicable. (Regulation 18702.2(g).) Under this standard, the effect of a decision regarding the proposed fee will be material if:

(1) The decision will result in an increase or decrease in the gross revenues for a fiscal year of \$10,000 or more; or

(2) The decision will result in the business entity incurring or avoiding additional expenses or reducing or eliminating existing expenses for a fiscal year in the amount of \$2,500 or more; or

(3) The decision will result in an increase or decrease in the value of assets or liabilities of \$10,000 or more.

(Regulation 18702.2(g).)

The imposition of school development fees will affect the corporation's expenses. Therefore, the decision would materially affect the corporation if the corporation is likely to incur or avoid \$2,500 or more in additional school development fees in a fiscal year. In the present situation, we do not know the amount of the proposed fee or the number of times Donna Thayer anticipates that the corporation would be required to pay this fee in the forthcoming year. Ms. Thayer must analyze these factors to determine whether the decision will have a reasonably foreseeable financial effect on the corporation.

B) Building Industry Association of California

School board member Thayer is on the board of directors of the central California chapter of BIA. BIA is part of a

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statewide nonprofit association and a member of the National Association of Home Builders. BIA lobbies for the building industries and has taken a position regarding the imposition of the proposed school development fee.

A "business entity," as defined by Section 82005, "... means any organization or enterprise operated for profit, including ... [an] association." Accordingly, Ms. Thayer's directorship does not qualify as a financial interest in a business entity pursuant to Section 87103(d) because BIA is nonprofit.

If, however, BIA has been a source of income of \$250 or more to Ms. Thayer within the 12 months preceding a governmental decision, a financial interest exists pursuant to Section 87103(c).^{3/} Regulation 18702 provides the guidelines for determining material financial effect when the source of income is not a business entity. Specifically, Regulation 18702(b)(3)(B) provides that an official must disqualify herself if "there is a nexus between the governmental decision and the purpose for which the official receives income." We have consistently interpreted this regulation to mean that a public official may not accomplish as an official what she has been paid to do in her nongovernmental capacity. (See, Advice Letter to Linda Best, No. A-81-032; Advice Letter to Jeffrey Gunther, No. A-82-055; and Advice Letter to Janet Cornelius, No. A-82-104 (copies enclosed).) In our Advice Letter to Linda Best, supra, we advised that a planning commissioner who also was the paid Executive Secretary of COLAB (the Coalition of Labor and Business) was disqualified from participating in decisions which could foreseeably further the policies of COLAB. We stated:

Since part of your duties as Executive Secretary is to lobby for COLAB's positions on governmental action, any actions you would take on the Planning Commission in connection with those positions could foreseeably further the policies of COLAB; there would therefore be a nexus between your actions on the Planning Commission and your duties as Executive Secretary of COLAB. For example, if COLAB took a position on the issue of slope density requirements, you would have to refrain from participating in a

^{3/} "Income" includes salary, reimbursement for expenses and per diem. (Section 82030(a).)

Planning Commission decision on the slope density ordinance. Or, if COLAB worked for changes in the process by which governmental entities reviewed proposals for development, you could not participate in Planning Commission decisions involving the process by which the Commission reviewed proposals for development. And, clearly, if COLAB did take a position relevant to a specific development or other type of proposal before the Planning Commission for review, you would be required to disqualify yourself from participating in the review of that proposal.

(Advice Letter to Linda Best,
supra, at pp 3-4.)

In her capacity as a member of BIA's board of directors, Donna Thayer promotes the policies and interests of that organization. BIA protects the interests of developers and has taken a position on the school development fee. Accordingly, if Ms. Thayer received \$250 or more in compensation from BIA within the preceding 12 months, a nexus exists between the purpose for which that income is received and the proposed fee. Under these circumstances, Ms. Thayer would be required to disqualify herself from participating in the district's decision.

If Ms. Thayer must disqualify herself from voting on the proposal, she must also disqualify herself from participating in school board deliberations regarding the proposal. Regulation 18700(c)(2)(B) defines "participation" as follows:

A public official ... "participates in the making of a governmental decision" when, acting within the authority of ... her position, ... she ... advises or makes recommendations to the decision-maker, ... directly ..., by ... preparing or presenting ... an opinion, orally or in writing, which requires the exercise of judgment on the part of the official ... and the purpose of which is to influence the decision.

This necessarily includes any attempts by Ms. Thayer to influence the board's deliberations. In the event that disqualification is necessary, Ms. Thayer must also refrain from other discussions with school board members regarding the proposed fee if the purpose of the discussion is to attempt to influence their decision. (Regulation 18700.1.) However, this does not preclude Ms. Thayer from appearing before the school

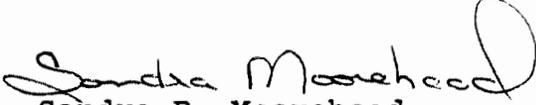
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board in the same manner as any other member of the general public to represent her personal interests. Regulation 18700.1(b)(1)(B) defines "personal interest" to include a business entity wholly owned by the official or members of his or her immediate family. This would permit Ms. Thayer's appearance before the school board, as a member of the general public, to represent the interest of the family corporation.

I hope that the information provided will answer the questions which you have posed. If you need further assistance or have additional questions regarding the contents of this letter, please do not hesitate to contact me at (916) 322-5901.

Sincerely,

Diane M. Griffiths
General Counsel


By: Sandra R. Moorehead
Staff Counsel

DMG:SRM:plh
Enclosures

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December 11, 1986

LEGISLATIVE CONSULTANT
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OF COUNSEL
E. KENDELL DAVIS
LEONARD M. FRIEDMAN

Chief Legal Counsel
Fair Political Practices Commission
P. O. Box 807
Sacramento, CA 95814

Re: Donna Thayer - FFPC Advice Request

Dear Counsel:

Our office has been authorized on behalf of Donna Thayer to request advice from the FFPC concerning a potential conflict of interest she may have in voting on certain matters as a school board member of the Modesto City School District.

Donna Thayer is currently a school board member of the Modesto City School District. On January 2, 1987, the School Board is voting on a proposal on whether to impose a school development fee on residential, commercial and industrial developers as a condition to their obtaining necessary building permits. The Board has the authority to impose such fees under the newly enacted California Government Code Section 53080. (Chapter 887, statutes of 1986.)

This letter is prompted by Ms. Thayer's disclosure that she is the sales and marketing director of Oakwood Builders Inc., and she serves on the board of directors of the Building Industry Association.

James Thayer, Inc., is a California corporation doing business as Oakwood Builders, Inc. Donna Thayer and her husband own the corporation, are its sole shareholders and Donna Thayer serves as director of sales and marketing. Oakwood Builders, Inc. is a business which develops land for residential, commercial and industrial use. The residential developments

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contain tracts of 50 to 100 homes which are sold directly to home buyers. Currently, Oakwood Builders, Inc. owns three residential developments within the limits of Modesto City School District. It also owns additional land within the District which it intends to develop in the future. Oakwood Builders, Inc. will necessarily require building permits for these and other developments within the school district in the next year.

The Building Industry Association of Central California ("BIA") is the local chapter of the statewide Building Industry Association and a member of the National Association of Home Builders. Donna Thayer, is a board member of the Central California Chapter of the BIA and her husband James Thayer is President. They have been members of the BIA through Oakwood Builders, Inc. for 10 years. The BIA engages in legislative advocacy for the building industries including lobbying for ordinance, zoning and code amendments.

As you can see there are several facts in the above discussion that indicate that Ms. Thayer may have a conflict of interest in voting on the proposed school development fee. Your advice is requested on the following matters:

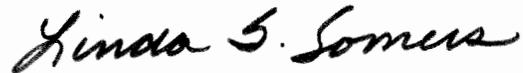
1. Whether Donna Thayer's position within Oakwood Builder's, Inc. and the BIA pose a conflict of interest with her voting as a member of the Modesto City School District's Board on the proposal to impose a school development fee on residential, commercial and industrial developers as a condition to their obtaining necessary building permits.
2. If such a conflict is found to exist, whether Donna Thayer must refrain from all board negotiations over the school development fee proposal.
3. Further, whether Donna Thayer must refrain from any and all discussions concerning the proposed school development fee with other members of the Modesto City School Board.

The Modesto City School District will vote on the school development fee on January 2, 1987. Therefore, we are concerned about receiving your opinion before that date. We understand that you require 21 working days to return opinions requested from your office. We understand these time constraints but are hoping you can issue us an opinion in writing or orally prior to January 2, 1987.

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Your prompt attention in this matter would be greatly appreciated. Please contact this office if you believe further information is required to answer some or all of the questions set forth above.

Very truly yours,

A handwritten signature in cursive script that reads "Linda S. Somers".

LINDA S. SOMERS

LSS:sb

cc: Donna Thayer
James Enochs, Superintendent



California Fair Political Practices Commission

December 17, 1986

Linda S. Somers
Kronick, Moskowitz, Tiedemann
& Girard
770 L Street, Suite 1200
Sacramento, CA 95814-3363

Re: 86-332

Dear Ms. Somers:

Your letter requesting advice under the Political Reform Act was received on December 12, 1986 by the Fair Political Practices Commission. If you have any questions about your advice request, you may contact me directly at (916) 322-5901.

We try to answer all advice requests promptly. Therefore, unless your request poses particularly complex legal questions, or more information is needed, you should expect a response within 21 working days. You also should be aware that your letter and our response are public records which may be disclosed to the public upon receipt of a proper request for disclosure.

Very truly yours,

A handwritten signature in cursive script that reads "Diane M. Griffiths".

Diane M. Griffiths
General Counsel

DMG:plh
cc: Donna Thayer