



California Fair Political Practices Commission

November 15, 1989

Honorable Jim Johnson
Chairman, County Board of Supervisors
County Government Center
San Luis Obispo, CA 93408

Re: Your Request for Advice
Our File No. A-89-500

Dear Mr. Johnson:

This is in response to your request for advice regarding your responsibilities as Chairman of the San Luis Obispo County Board of Supervisors under the conflict-of-interest provisions of the Political Reform Act (the "Act").¹ We make no comments as to past conduct but only address those decisions you will be called upon to make in the near future. (Regulation 18329(b)(8)(A), copy enclosed.)

This letter confirms telephone advice provided to you on October 4, 1989. Additionally, this letter answers your request for reconsideration of the advice provided to you at that time and revisits the telephone advice provided to you on October 5, 1989.

QUESTIONS

1. You own real property and have other financial interests within the county. Under the Act, are you prohibited from participating in the adoption of a growth control ordinance?
2. If disqualification is required, how do you disqualify yourself from participating in the decision?

CONCLUSIONS

1. Based on the facts provided, passage of a growth control ordinance will have a reasonably foreseeable material financial effect, distinguishable from the effect on the public generally, on your financial interests. Accordingly, you must disqualify from participating in the decision.

¹ Government Code Sections 81000-91015. All statutory references are to the Government Code unless otherwise indicated. Commission regulations appear at 2 California Code of Regulations Section 18000, *et seq.* All references to regulations are to Title 2, Division 6 of the California Code of Regulations.

the San Luis Obispo County Board of Supervisors appointed a blue-ribbon committee to propose the framework of a growth management ordinance.

Acting on the recommendations of the committee, on August 23, 1989, the board of supervisors enacted an urgency interim growth control ordinance which would be in effect for a period of 45 days. A vote on the adoption of the ordinance as a one-year interim growth control ordinance was scheduled for October 4, 1989. The ordinance would limit building permits for new residences to a 2.5 percent annual growth rate and would prohibit subdivision of existing parcels in the unincorporated areas of the county except within urban and village reserve lines. Passage of the ordinance requires a 4/5 vote by the board of supervisors.

You are concerned that, as the board addresses the adoption of a county-wide growth control ordinance, you may be disqualified from participating in the decisionmaking process because of a conflict of interest.

ANALYSIS

1. Conflict of Interest

Section 87100 prohibits public officials from making, participating in, or using their official position to influence any governmental decision in which they have a financial interest. As chairman of the county board of supervisors, you are a public official. (Section 82048.)

An official has a financial interest in a decision if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official or a member of his or her immediate family or on:

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

(b) Any real property in which the public official has a direct or indirect interest 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.

2. Disqualification is accomplished by stating, on the record, the disqualifying financial interest or interests, and abstaining from participating in or attempting to influence those decisions.

FACTS

You are the Chairman of the San Luis Obispo County Board of Supervisors. Prior to your election to this office you were active in construction and land development. Some of those projects continue at this time. You currently have an interest in two parcels situated in unincorporated areas of the County of San Luis Obispo.

One of your land holdings consists of a 50-percent interest in a limited partnership of which you are the general partner. This partnership, Johnson Investments, Ltd., was formed for the exclusive purpose of developing and selling the "Laguna Hills Project," a large tract of land adjoining the City of San Luis Obispo. The partnership owns a 1/11th interest in the current holdings of the project, which presently consist of approximately 500 acres of land. You estimate the value of the land in its undeveloped condition to be approximately \$2,000,000 to \$2,500,000.

Approximately 450 of these acres are zoned agricultural and cannot be subdivided. The remaining 50 acres are zoned suburban-residential and could be subdivided into one-acre parcels. These 50 acres have been proposed for annexation to the city of San Luis Obispo for the purpose of rezoning and developing the land as a residential-golf course project. If annexed and developed, the value of the land would increase to approximately \$25,000,000. If annexation is denied, the company intends to apply to the county for development.

You also own 10 acres in the unincorporated southern part of the county. Your personal residence and another residence occupied by your son-in-law and daughter are situated on this parcel. The property is used as a successful working avocado orchard. Current zoning permits the division of this property into two five-acre parcels. However, a lot division would probably be denied by the county because of the agricultural use of the property.

You estimate that the total population of the county is approximately 208,000 persons, 88,000 of whom reside in the unincorporated areas of the county. There are approximately 34,000 vacant parcels of land in the unincorporated area, ranging from residential lots to very large agricultural parcels. Under current zoning, approximately 24,000 of these parcels could be subdivided into a total of approximately 100,000 parcels.

The county board of supervisors has been under pressure to enact a county-wide growth control ordinance. In June of 1988,

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

(e) Any donor of, or any intermediary or agent for a donor of, a gift or gifts 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.

Section 87103(a)-(e).

You have investment interests in Johnson Investments and in the company which plans to develop the Laguna Hills Project. Each of these interests has a value in excess of \$1,000. Your ownership interest in your residence undoubtedly has a value in excess of \$1,000. Accordingly, you may not participate in any decision which will have a reasonably foreseeable material financial effect, distinguishable from the effect on the public generally, on Johnson Investments, the company which plans to develop the Laguna Hills Project, or your home.

The effect of a decision is reasonably foreseeable if there is a substantial likelihood that it will occur. To be foreseeable, the effect of a decision must be more than a mere possibility; however certainty is not required. Downey Cares v. Downey Development Com. (1987) 196 Cal. App. 3d 983, 989-991; Witt v. Morrow (1977) 70 Cal. App. 3d 817, 822; In re Thorner (1975) 1 FPPC Ops. 198, copy enclosed.) The Act seeks to prevent more than actual conflicts of interest, it seeks to prevent even the appearance of a possible conflict of interest. (Witt v. Morrow, supra, at 823.)

You have stated that the partnership in which you hold one half of a 1/11 interest has an interest in developing a subdivision on 50 of the 500 acres it owns. While the hope is to annex this property to the city for purposes of development, if the annexation does not occur, the plan is to seek approval of the subdivision from the county. The ordinance specifically limits approval of new subdivisions. Accordingly, it is reasonably foreseeable that adoption of the ordinance would prevent the development of the 50 acres owned by the partnership in which you hold a 1/22 interest.

Where the effect of a decision is foreseeable and material, a public official must abstain from participating in the decision. For a business entity indirectly involved in a decision, the effect of the decision is material if 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)(3), copy enclosed.)

Adoption of a growth control ordinance would have a material financial effect upon your interests. If annexation is denied,

the growth control ordinance would prevent development of the 500 acres in which you hold an interest. Presumably, the value of the land intended for subdivision, which is an asset of the company in which you hold a 1/22 interest, would increase or decrease in value by \$10,000 or more depending upon whether or not the 50-acre parcel is available for subdivision. Thus, because your economic interests will be materially affected by any decision related to a growth control ordinance, you must disqualify from participating in these decisions unless an exception applies to your facts.

Even when the effect of a decision is foreseeable and material, a public official may participate in a decision if the effect on his or her interests is not distinguishable from the effect on the public generally. (Section 87102, Regulation 18703, copy enclosed.) The "public" consists of all persons residing, owning property, or doing business in the jurisdiction of the agency in question. (In re Legan (1985) 9 FPPC Ops. 1, 15, copy enclosed.) In your case, the public is the entire population of the county. Consequently, for the public generally exception to apply, any decision would have to affect a significant segment of the population of the county in substantially the same manner as it would affect you. (Dowd Advice Letter, No. A-88-214; Burnham Advice Letter, No. A-86-210, copies enclosed.)

The Commission has never adopted a strict arithmetic test for determining what constitutes a significant segment of the public. However, in order to apply the public generally exception, the population affected must be large in number and heterogeneous in nature. (In re Ferraro (1978) 4 FPPC Ops. 62; Flynn Advice Letter, No. I-88-430, copies enclosed.) Additionally, the group affected by the decision must be affected in a substantially similar way.

In Legan, supra, a county board of supervisors was considering a modification to a provision of the county's general plan which, if adopted, would increase the number of dwelling units which could be built on certain large parcels of undeveloped property. Because of the nature of the amendment, only parcels of 40 acres or more would be affected by the proposed change. In total, 742 parcels were in excess of 40 acres. This represented 0.9 percent or less of all the parcels in the unincorporated area of the county and less than 0.25 percent of all the parcels in the county. Kaiser aluminum, Mr. Legan's employer, owned 1,001 acres in the affected area, 967 of which consisted of four parcels of 40 acres or more which would be impacted by the proposed amendment. Kaiser had no plans to subdivide the land.

In analyzing whether the public generally exception applied, the Commission reasoned as follows:

Of all the Hillside property, only 738 parcels of 40 acres or more may be affected in substantially the same manner as Kaiser's four parcels. We have no information regarding this group of parcels

except that all are 40 acres or more and would have their density limitations doubled by the proposed action. Assuming that each parcel has a separate owner, only 738 property owners among 383,000 property owners in the county may be affected in substantially the same manner as Kaiser. The other 4,029 Hillside property owners will be unaffected by the Hillside Density Amendment and, hence, not in "substantially the same manner" as Kaiser. Consequently, the 4,773 hillside parcel owners are not the group upon which we must focus.

The only group which will be affected in substantially the same manner as Kaiser is the owners of the other 738 Hillside parcels of 40 acres or more. This group has neither the numerical size nor the heterogeneity to constitute a significant segment of the public....

Legan, supra, at page 14, emphasis added.

It follows from the above that, for the public generally exception to apply to your facts, the growth control ordinance would have to affect a significant segment of owners of parcels who are similarly situated to you, and it would have to affect them in substantially the same manner as it would affect you. We do not have any facts to indicate that this is the case. We conclude, then, that the public generally exception does not apply to your facts.

In his request for reconsideration of our advice, your attorney, Mr. Stephen N. Cool, refers our attention to Consumers Union v. California Milk Producers Advisory Board (1978) 82 Cal. App. 3d 433 in support of the proposition that the "public generally" exception should apply in this instance. We concur with Mr. Cool's summation of the court's holding that regulatory board members whose financial interests were directly affected by their decisions were not precluded from voting on matters before the board. However, because you are not a member of the board of an industry, trade or profession, this case is inapplicable to your facts.

In Consumers Union the court discussed the applicability of the public generally exception to members of a trade, industry, or profession. The court found that, when an agency is required or expressly authorized by law to draw its members from that particular trade, industry or profession, industry board members may participate in governmental decisions that affect their financial interests if such decisions would similarly affect others in the same industry, trade or profession. This conclusion was based on a Commission regulation which provided a specific exemption in such circumstances. Thus, in this particular setting, the public were the members of the industry, trade or profession.

The Commission has reached a similar conclusion with regard to members of an industry, trade or profession. In re Callanan, Sands and Hill (1978) 4 FPPC Ops. 33 (copy enclosed) the Commission considered the possible conflict of interest of Members of the Board of Funeral Directors and Embalmers. The decision in question involved a determination of whether or not funeral directors should be required to obtain consent from the next of kin prior to embalming. This decision would affect virtually all members of the funeral industry but would not directly and peculiarly affect an interest of any industry board member in a manner different from other funeral directors. To the contrary, the effect on each industry board member would be similar to the effect on most members of the funeral industry. For this reason, the Commission concluded that the three board members were not disqualified from participating in the decision. Since three of the Board members were required to be licensed funeral directors, the funeral industry was tantamount to the "public generally" for purposes of determining whether such persons must be disqualified from participating in Funeral Board matters.

Mr. Cool further refers our attention to Commission Opinions which he believes support the proposition that the public generally exception should apply to your facts. We disagree.²

In Oglesby the Commission considered whether a member of the redevelopment agency could participate in the decision to adopt the redevelopment plan. The chairman of the redevelopment agency owned three properties within the project area, several blocks from the proposed civic center. These included his real estate office and two rental properties. The chairman's real estate business included participation in the board of realtors multiple listing service. By reason of such participation, he could offer properties listed in the service to his customers, including properties in the redevelopment area.

The Commission concluded that the proposed redevelopment plan would have a foreseeable material financial effect on the chairman's real estate business which coupled with his interest in real property, required his disqualification.

In Gillmor the Commission again considered the disqualification requirements for a mayor who owned commercial real property in the vicinity of land to be rezoned. Because of his financial interest in the decision, the Commission advised that disqualification was required. Moreover, at footnote 5, the Commission clearly stated that individuals affected by a rezoning decision do not constitute the public generally or a significant

² Specifically, we are directed to In re Oglesby (1975) 1 FPPC 71; In re Gillmor (1977) 3 FPPC Ops. 38; In re Ferraro (1978) 4 FPPC Ops. 62; and In re Callanan, Sands and Hill (1978) 4 FPPC Ops. 33, copies enclosed.

segment thereof. Moreover, even if they did, the extent of Mayor Gillmor's holdings would clearly distinguish the effect of the rezoning decision on those holdings from its effect on the interests of others with holdings in the area.

In Ferraro the Commission did find that owners of three or fewer rental units would not be affected by rent control decisions in a manner distinguishable from the effect upon a significant segment of the public. This is so, the Commission concluded, because the small landlord may just rent a room in his home, may have inherited a home from relatives or may have retained ownership of his old home when he moved to a new one. His interest is likely to be incidental and not relied upon as a major source of income. While those owning large numbers of rental units could be considered part of an "industry," owners of a small number of units were not a part of the rental property industry but rather were a diverse segment of the population representing all occupations and interests and whose only common bond was the ownership of rental property. Thus, the public generally applied to owners of three or fewer rental units.

Clearly the above authorities are inapplicable to your facts. Owners of 50-acre parcels of land capable of subdivision do not constitute an industry nor are they representative of the public generally. As in Gillmor, supra, the extent of your holdings distinguishes the effect of the growth control ordinance on your holdings from its effect on the interests of others with smaller holdings in the area. Consequently, the public generally exception is inapplicable to your particular situation.

We turn now to the telephone advice provided to you on October 5, 1989. At that time you asked whether you could participate in decisions related to the allocation of housing units in the Southern area of the county. You were advised that participation in such decisions was permissible as long as they did not affect any interest in real property you might have. Upon reconsideration and with greater familiarity with the facts, we conclude that participation in any matter related to the growth control ordinance is impermissible. We reach such a conclusion because allocation of housing units within the limitations of the proposed ordinance would have a reasonably foreseeable material financial effect, as discussed above, upon the 50 acres in which you hold an interest.

Briefly stated, you own an interest in a business entity which specifically intends to subdivide a large parcel of undeveloped property. The decisions you have referred to will not have a similar effect upon a significant segment of the public. Accordingly, we conclude that passage of the growth control ordinance will affect your economic interests in a manner which is distinguishable from the effect upon the public generally and you must abstain from participating in decisions related to passage of the proposed growth control ordinance. Having reached this

conclusion, we need not address whether your home is also a basis for disqualification.

2. Disqualification

When a public official determines that he or she is required to disqualify from participating in a decision, the public official may not participate in discussions or vote on the issues or otherwise use his position to influence the decision. (Regulation 18700.1, copy enclosed.) To abstain from participation, the official must disclose his or her disqualifying financial interests on the record and then refrain from participating in or attempting to influence the decision. (Regulation 18700(b)(5), copy enclosed.) In general, a disqualified official may not vote on the decision, make or second a motion, engage in debate, ask questions, or otherwise take part in the decisionmaking process. However, statements to the press or general public, outside of the meeting of the board of supervisors, are not prohibited. (Regulation 18700.1(a).)

I trust this letter responds to your inquiry. Should you have any further questions please address the matter to us in writing so that we may have a clearer grasp of the facts before we provide you with advice.

Sincerely,

Kathryn E. Donovan
General Counsel



By: Blanca M. Breeze
Counsel, Legal Division

KED:BMB:plh

Enclosures