



California Fair Political Practices Commission

October 3, 1989

M. Dwain Smith
City Attorney
City of Tehachapi
1120 Kensington
Delano, CA 93215

Re: Your Request for Informal Assistance
Our File No. I-89-541

Dear Mr. Smith:

This is in response to your request for a confirmation of telephone advice provided to you on September 13, 1989 on behalf of Tehachapi Mayor Kelcy Owens concerning the mayor's responsibilities pursuant to the conflict-of-interest provisions of the Political Reform Act (the "Act").^{1/} In that conversation you stated that the mayor was confronted with a city council decision concerning an engineering firm owned in part by the mayor's son-in-law. You stated that the mayor had no other financial interest in the decision as specified in Section 87103. You asked whether the son-in-law's interest in the engineering firm created a conflict of interest for the mayor with respect to city council decisions regarding the engineering firm.

As I stated in our subsequent telephone conversation on September 19, 1989, since your original question referred to a vote that had taken place prior to our initial telephone conversation, pursuant to Regulation 18329(b)(8)(A) (copy enclosed), I cannot provide formal written advice concerning past conduct. However, you also stated that the issues involved in your request are relevant to the mayor's participation in future city council decisions concerning the engineering firm. Therefore, we provide the following general guidelines with respect to the mayor's

^{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.

future participation in situations that may come before the city council.^{2/}

Section 87100 prohibits any public official from making, participating in making, or otherwise using his official position to influence a governmental decision in which the official has a financial interest. Section 87103 specifies that an official has a financial interest if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from the 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.

(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.

"Immediate family" is defined in Section 82029 as the official's spouse and dependent children. A child is considered a "dependent child" for purposes of the Act if the child is under 18 and the elected official is entitled to claim the dependent child as such for income tax purposes. (Tremlett Advice Letter, No. I-89-386, copy enclosed.) According to this definition, it would appear the son-in-law of the mayor is not a dependent child of the

^{2/} Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c)(3).)

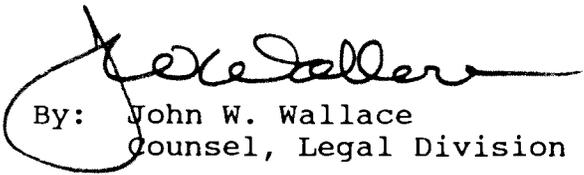
mayor, and thus, is not a member of the mayor's immediate family.^{3/}

Consequently, absent some other disqualifying financial interest as set forth in Section 87103, or some direct financial effect on the mayor personally resulting from the governmental decision, the mayor may participate in city council decisions concerning the engineering firm despite his son-in-law's ownership interest in the firm.

If any further questions regarding this matter, please feel free to contact me at (916) 322-5901.

Sincerely,

Kathryn E. Donovan
General Counsel



By: John W. Wallace
Counsel, Legal Division

KED:JWW:plh

Enclosures

^{3/} Of course the mayor's daughter may continue to be part of the mayor's immediate family if the daughter is under 18 and is or could be claimed as a dependent child for income tax purposes. Moreover, any financial effect on the son-in-law would presumably be a financial effect on his spouse. We do not have information about the mayor's daughter's age or tax status and therefore cannot advise you with respect to this issue.

Law Offices of

M. Dwain Smith
A PROFESSIONAL CORPORATION
M. DWAIN SMITH

FSPC

SEP 13 10 03 AM '89
1120 Kensington
Delano, California 93215
Telephone 725-3547
Area Code 805

September 14, 1989

FAIR POLITICAL PRACTICES COMMISSION
P.O. Box 807
Sacramento, Ca 95804

Attn: John Wallace

Re: City of Tehachapi Opinion

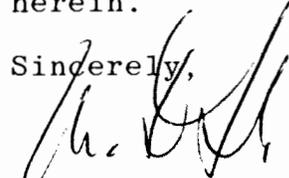
Dear Mr. Wallace:

Per our telephone conversation of September 13, 1989, I enclose herewith my opinion to the Tehachapi City Council concerning a conflict of interest question.

Would you please review the enclosed memo and if you agree therewith please confirm same and return to me for for delivery to each council member.

Thank you for your cooperation herein.

Sincerely,


M. DWAIN SMITH

MDS/ss
Enc.

MEMO TO: Tehachapi City Council

RE: Kelcy Owens - Conflict of Interest

DATE: September 13, 1989

FACTS:

The five members of the Tehachapi City Council are elected at large and Kelcy Owens (herein "Mayor") was heretofore chosen as and is now the Mayor per Government Code Section 36801. The Mayor has a son-in-law who is a partner of an engineering firm in Bakersfield. Neither the Mayor nor his wife have ever owned nor do they now own or have any interest of any nature whatsoever in the engineering firm in which their son-in-law is a partner; neither the Mayor and/or his wife nor his son-in-law and/or daughter owe the other any money; nor does the Mayor and/or his wife and his son-in-law and/or daughter own any property of any nature whatsoever jointly or by any other method; nor do they have any joint business ventures or enterprises of any nature whatsoever; nor is the Mayor and/or his wife dependent upon nor do they receive any form of support from son-in-law and/or daughter; nor is son-in-law and/or daughter dependent upon nor do they receive any form of support from the Mayor and/or his wife; the Mayor and his wife reside in Tehachapi and the son-in-law and his wife reside in Bakersfield in different households; neither the son-in-law nor his wife nor any of their children are part of the Mayor's "immediate family" as such term is defined by Section 82029 of the Government Code; their only relationship personally or business-wise, is as father/mother-in-law and son-in-law/daughter.

QUESTION NO. 1:

Is it a violation of Section 1090, et. seq. of the Government Code of the State of California (commonly referred to as "Contractual Conflicts of Interest") (herein "G.C. 1090") for the Mayor to participate in or vote on the Council's adoption of a resolution hiring the engineering firm in which his son-in-law is a partner as the Engineer of Work for the Community Facilities District No. 89-1 and/or 89-2 (Mello Roos Bonds) knowing that his son-in-law is a partner of that engineering firm?

ANSWER AND OPINION:

a. Answer:

The Mayor is not in violation of Section 1090, et. seq.

b. Opinion:

The applicable portion of G.C. 1090 reads as follows:

"Members of --- a district --- and city officers --- shall not be financially interested in any contract

made by them in their official capacity, or by any body or board of which they are members. Nor shall --- city officers --- be purchasers at any sale or vendors at any purchase made by them in their official capacity". (Emphasis added)

This section prohibits a person from being "financially interested" in any contract made by them in their official capacity and prohibits them from being purchasers at any sale or vendors at any purchase made by them in their official capacity. From the foregoing facts, it is obvious to me that the Mayor has no "financial interest" in the contract between the City and the engineering firm of which his son-in-law is a partner.

Section 1091 (a) of the Government Code reads as follows:

"An officer shall not be deemed to be interested in a contract entered into by a body or board of which the officer is a member within the meaning of this article if the officer has only a remote interest in the contract and if the fact of that interest is disclosed to the body of the board of which the officer is a member and noted in its official records, and thereafter the body or board authorizes, approves, or ratifies the contract in good faith by a vote of its membership sufficient for the purpose without counting the vote or votes of the officer or member with the remote interest." (Emphasis added)

A "remote interest" is defined in Section 1091 (b) which is approximately two single spaced type pages and too lengthly and unnecessary for me to summarize in this opinion because even if it could be found that the Mayor had a "remote interest" he (1) divulged this fact to the Council and (2) thereafter his vote was not necessary for the passage of the resolution(s) hiring the engineering firm of which his son-in-law is a member.

The pertinent portion of G.C. Section 1091.5 of the Government Code reads as follows:

"(a) An officer or employee shall not be deemed to be interested in a contract if his or her interest is any of the following:

(The section then defines such insignificant or nominal interest which the law is not concerned with and the Mayor may fully participate and vote on the issue.)"

QUESTION NO. 2:

Is it a violation of Section 87100, et. seq. of the Government Code of the State of California (Political Reform Act of 1974) for the Mayor to participate in or vote on the Council's adoption of a resolution hiring the engineering firm in which his son-in-law is a partner

as the Engineer of Work for the Community Facilities District No. 89-1 and/or 89-2 (Mello Roos Bonds) knowing that his son-in-law is a partner of that engineering firm?

ANSWER AND OPINION:

a. Answer:

The Mayor is not in violation of Section 87100, et. seq.

b. Opinion:

Section 87100 of the Government Code states as follows:

No "Public Official" (defined by Section 82048 and means every member, officer, employee or consultant of a state or local government agency. "Local government agency" is defined by Section 82041 and means a county, city or district of any kind including school districts, etc.) at any level of state or local government shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a "financial interest". (Emphasis and definitions added.)

Section 87103 defines "financial interest" as follows:

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 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.

(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.

For purposes of this section, indirect investment or interest means any investment or interest owned by the spouse or dependent child of a public official, by an agent on behalf of a public official, or by a business entity or trust in which the official, the official's agents, spouse, and dependent children own directly, indirectly, or beneficially a 10-percent interest or greater.

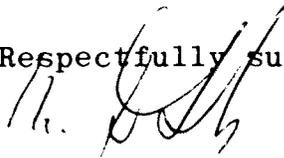
Section 82029 of the Government Code states as follows:

"Immediate family" means the spouse and dependent children.

From the foregoing facts and what the Mayor told me by telephone this day, it is clear that the Mayor does not have a "financial interest" (as hereinabove defined) in the contract between the City of Tehachapi and the engineering firm in which his son-in-law is a partner.

I telephoned the Fair Political Practices Commission ("FPPC") in Sacramento this day and spoke with John Wallace, an attorney in its legal division. One of the functions of its legal division is to render legal opinions concerning the interpretation/application of the Political Reform Act of 1974, as amended. He concurred by telephone with my foregoing opinion concerning the facts as applied to Section 87100, et. seq. of the Government Code and told me that he would be glad to confirm that opinion if I would mail him a copy of this memo. Accordingly, I am forwarding a copy of this opinion to Mr. Wallace by mail this day and upon my receipt of his confirmation thereof I will supply it to each Council member.

Respectfully submitted,


M. DWAIN SMITH

MDS/ss

Law Offices of

M. Dwain Smith
A PROFESSIONAL CORPORATION
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F P P C

SEP 18 10 03 AM '89
1120 Kensington
Delano, California 93215
Telephone 725-3547
Area Code 805

September 14, 1989

FAIR POLITICAL PRACTICES COMMISSION
P.O. Box 807
Sacramento, Ca 95804

Attn: John Wallace

Re: City of Tehachapi Opinion

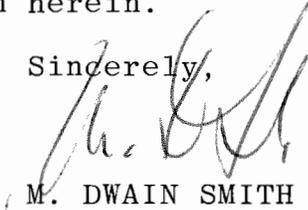
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Would you please review the enclosed memo and if you agree therewith please confirm same and return to me for for delivery to each council member.

Thank you for your cooperation herein.

Sincerely,



M. DWAIN SMITH

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Enc.

MEMO TO: Tehachapi City Council

RE: Kelcy Owens - Conflict of Interest

DATE: September 13, 1989

FACTS:

The five members of the Tehachapi City Council are elected at large and Kelcy Owens (herein "Mayor") was heretofore chosen as and is now the Mayor per Government Code Section 36801. The Mayor has a son-in-law who is a partner of an engineering firm in Bakersfield. Neither the Mayor nor his wife have ever owned nor do they now own or have any interest of any nature whatsoever in the engineering firm in which their son-in-law is a partner; neither the Mayor and/or his wife nor his son-in-law and/or daughter owe the other any money; nor does the Mayor and/or his wife and his son-in-law and/or daughter own any property of any nature whatsoever jointly or by any other method; nor do they have any joint business ventures or enterprises of any nature whatsoever; nor is the Mayor and/or his wife dependent upon nor do they receive any form of support from son-in-law and/or daughter; nor is son-in-law and/or daughter dependent upon nor do they receive any form of support from the Mayor and/or his wife; the Mayor and his wife reside in Tehachapi and the son-in-law and his wife reside in Bakersfield in different households; neither the son-in-law nor his wife nor any of their children are part of the Mayor's "immediate family" as such term is defined by Section 82029 of the Government Code; their only relationship personally or business-wise, is as father/mother-in-law and son-in-law/daughter.

QUESTION NO. 1:

Is it a violation of Section 1090, et. seq. of the Government Code of the State of California (commonly referred to as "Contractual Conflicts of Interest") (herein "G.C. 1090") for the Mayor to participate in or vote on the Council's adoption of a resolution hiring the engineering firm in which his son-in-law is a partner as the Engineer of Work for the Community Facilities District No. 89-1 and/or 89-2 (Mello Roos Bonds) knowing that his son-in-law is a partner of that engineering firm?

ANSWER AND OPINION:

a. Answer:

The Mayor is not in violation of Section 1090, et. seq.

b. Opinion:

The applicable portion of G.C. 1090 reads as follows:

"Members of --- a district --- and city officers --- shall not be financially interested in any contract

made by them in their official capacity, or by any body or board of which they are members. Nor shall --- city officers --- be purchasers at any sale or vendors at any purchase made by them in their official capacity". (Emphasis added)

This section prohibits a person from being "financially interested" in any contract made by them in their official capacity and prohibits them from being purchasers at any sale or vendors at any purchase made by them in their official capacity. From the foregoing facts, it is obvious to me that the Mayor has no "financial interest" in the contract between the City and the engineering firm of which his son-in-law is a partner.

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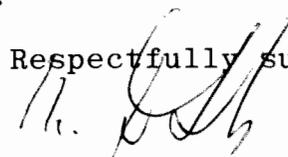
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Respectfully submitted,


M. DWAIN SMITH

MDS/ss



California Fair Political Practices Commission

September 20, 1989

M. Dwain Smith
1120 Kennsington
Delano, CA 93215

Re: Letter No. 89-541

Dear Mr. Smith:

Your letter requesting advice under the Political Reform Act was received on September 18, 1989 by the Fair Political Practices Commission. If you have any questions about your advice request, you may contact John Wallace an attorney in the Legal Division, 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 if your request seeks formal written advice. If more information is needed, the person assigned to prepare a response to your request will contact you shortly to advise you as to information needed. If your request is for informal assistance, we will answer it as quickly as we can. (See Commission Regulation 18329 (2 Cal. Code of Regs. Sec. 18329).)

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 "Kathryn E. Donovan".

Kathryn E. Donovan
General Counsel

KED:plh