



# California Fair Political Practices Commission

November 6, 1989

Steven J. Brookes  
City Attorney  
City of Lakeport  
225 Park Street  
Lakeport, CA 95453

Re: Your Request for Informal Assistance  
Our File No. I-89-585

Dear Mr. Brookes:

You have requested advice on behalf of Arlin Pischke, a city councilmember in the City of Lakeport, regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").<sup>1</sup> You have also provided us with a letter from Councilmember Pischke, dated October 18, 1989, which contains additional information. Since the information provided is general in nature, we are treating your request as one for informal assistance pursuant to Regulation 18329(c).<sup>2</sup>

#### QUESTION

May the councilmember participate in decisions which may indirectly affect his employer, First West Companies?

#### CONCLUSION

The councilmember may participate in decisions which indirectly affect his employer, unless the decisions affect the

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<sup>1</sup> 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.

<sup>2</sup> Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Government Code Section 83114; 2 Cal. Code of Regs. Section 18329(c)(3).)

employer materially. The same limitations will apply to partnerships in which certain officers of the employer are partners if the two business entities are found to be related entities under the Act.

#### FACTS

Councilmember Pischke is employed by First West Companies ("First West") as a real estate consultant. First West is a California corporation which owns, manages or controls a real estate portfolio in 13 states. It owns an office building in the City of Lakeport as well as ranch property south of the city. It also owns a partnership interest in property south of the city. Additionally, First West Inns, a subsidiary of First West, owns property and a restaurant north of the city and operates a leased restaurant in the city. The chief executive officer of First West and its president also own property in the city by way of two partnerships: Will-O-Point Associates and L&G Associates. The chief executive officer of First West is the general partner for both partnerships.

First West's real estate portfolio is valued at approximately \$400,000,000. The estimated value of property directly owned by First West in or within the sphere of influence of the city is approximately \$3,000,000. When combined with the partnership properties, the total value of the property interest is about \$10,000,000.

First West is suing the City of Lakeport in federal district court. One of the issues in that suit is whether the city misled First West regarding the city's ability to provide adequate sewer services for a proposed resort hotel project.

The councilmember is not a stockholder, officer or director of First West, nor does he make management decisions for the firm. He has abstained from voting on matters that directly involve First West.

The city council is considering the following actions:

- a) Raising sewer connection fees;
- b) Forming an assessment district to finance needed improvements to the city sewer system;
- c) Raising water connection fees;
- d) Raising other city fees that are imposed on property owners/developers at the time a property is developed;
- e) Updating its general plan which contains annexation policies that could affect property owned by the development company;

- f) Increasing monthly service charges for water and sewer;
- g) Applying for parks grants;
- h) Developing new capital improvement policies; and
- i) Forming other assessment districts to fund such capital improvements as traffic signals, parks, roads, etc.

#### ANALYSIS

The conflict-of-interest provisions of the Act prohibit a public official from making, participating in making, or in any way attempting to use his or her official position to influence a governmental decision in which the public official knows or has reason to know he or she has a financial interest. (Section 87100.) As a member of the city council, Mr. Pischke is considered to be a public official. (Section 82048.)

#### Financial Interest

Whether the official has a financial interest in the decision is governed by Section 87103, which provides in part:

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:

\* \* \*

(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, emphasis added.

Councilmember Pischke is an employee of First West. First West would also be considered a source of income to the councilmember, if we presume that he has received income of \$250 or more from First West within the preceding 12 months. Therefore, under either subdivision (c) or (d) of Section 87103, the councilmember will be deemed to have a financial interest in the decision for purposes of the Act, if it is foreseeable that First West will be materially affected by decisions of the city council.

The information provided indicates that some of the properties are owned by two partnerships rather than by First West. You have not indicated that the councilmember is employed by those partnerships, nor have you indicated that the partnerships are a source of income to the councilmember. Therefore, the councilmember is not precluded from participating in decisions regarding these partnerships unless they are deemed to be related to First West.

Regulation 18706 provides as follows:

An official has a financial interest in a decision within the meaning of Government Code 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 a business entity which is a parent or subsidiary of, or is otherwise related to, a business entity in which the official has one of the interests defined in Government Code Section 87103(a), (c) or (d).

Regulation 18706.

Regulation 18236 defines a "parent-subsidiary" relationship and an "otherwise related business entity" as follows:

(a) Parent-subsidiary. A parent-subsidiary relationship exists when one corporation directly or indirectly owns shares possessing more than 50 percent of the voting power of another corporation.

(b) Otherwise related business entity. Business entities, including corporations, partnerships, joint ventures and any other organizations and enterprises operated for profit, which do not have a parent-subsidiary relationship are otherwise related if any one of the following three tests is met:

(1) One business entity has a controlling ownership interest in the other business entity.

(2) There is shared management and control between the entities. In determining whether there is shared management and control, consideration should be given to the following factors:

(A) The same person or substantially the same person owns and manages the two entities;

(B) There are common or commingled funds or assets;

(C) The business entities share the use of the same offices or employees, or otherwise share activities, resources or personnel on a regular basis;

(D) There is otherwise a regular and close working relationship between the entities; or

(3) A controlling owner (50% or greater interest as a shareholder or as a general partner)<sup>3</sup> in one entity also is a controlling owner in the other entity.

(c) Disclosure of investment interests. An official who holds a reportable investment in one business entity need not disclose the name of any parent, subsidiary or otherwise related business entity on his or her Statement of Economic Interests.

#### Regulation 18236.

If the partnerships are related to First West in any of the ways set forth above, the councilmember likewise will be considered to have a financial interest in the partnerships.

#### Foreseeability

The effect of a decision is reasonably foreseeable if there is a substantial likelihood that it will occur. However, there must be something more than a mere possibility that the effect will occur. (In re Thorne (1975) 1 FPPC Ops. 198, copy enclosed.) In this instance, it is foreseeable that the actions contemplated by the city will have a financial effect upon First West. For example, a decision to raise sewer connection fees or

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<sup>3</sup> In 1985, the Commission adopted a policy interpreting a controlling ownership interest as an ownership interest of more than 50%.

to raise other city fees imposed on developers at the time property is developed will cause the developer to incur additional expenses.

### Materiality

Even if a decision will have a foreseeable financial effect on First West, the councilmember is not disqualified in participating in the decision unless the decision will affect First West materially. If First West is directly involved in the decision, it will be deemed to be materially affected by the decision. (Regulation 18702.1, copy enclosed.)<sup>4</sup> Therefore, the councilmember may not participate in those decisions directly involving First West, including the lawsuit in which First West is a party. Your information indicates that he has abstained from voting in such situations. He must be careful not to participate in any way in these decisions. Nor may he use his official position to attempt to influence other members, officers, employees or consultants of the agency with respect to any decision. (Regulation 18700.1, copy enclosed.)

If First West is not directly involved in a decision, the councilmember may still need to disqualify himself if the decision affects First West indirectly and materially. Regulation 18702.2 (copy enclosed) sets forth the criteria for determining whether an indirect financial effect on a business entity is material. Materiality is related to the size of the business entity. We do not have sufficient information to determine which category applies to First West. For the purposes of this analysis, we will apply the most restrictive test. In the event that First West falls into a different category, you may adjust the materiality figures accordingly. Under the most restrictive test, a decision will be deemed to materially affect a business entity 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.

Section 18702.3(g).

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<sup>4</sup> Regulation 18702.1(b) defines when a person or business entity is directly involved in a decision before an official's agency.

Public Generally

Even if it is ascertained that the effect of a particular decision will have a material financial effect on First West, Councilmember Pischke may participate in the decision if the effect on First West is not distinguishable from the effect on the public generally. (Section 87103.) Regulation 18703 (copy enclosed) provides, in part:

A material financial effect of a governmental decision on an official's interests, as described in Government Code Section 87103, is distinguishable from its effect on the public generally unless the decision will affect the official's interest in substantially the same manner as it will affect all members of the public or a significant segment of the public.

The "public" is all the persons residing, owning property, or doing business in the jurisdiction of the agency in question. (In re Legan (1985) 9 FPPC Ops. 1, copy enclosed.) In the case of the city council, this would be the City of Lakeport. Consequently, for the public generally exception to apply, any decision which will materially affect First West would have to affect a significant segment of the City of Lakeport in substantially the same manner. (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.)

In addition to comprising a significant segment of the jurisdiction, the group affected must be affected in a substantially similar way. Decisions affecting the value of property, including the proposed fees and assessments, will have a greater total dollar effect on larger owners and developers than on smaller owners even if the method of calculation is the same. (Moe Advice Letter, No. A-89-454, copy enclosed.) Therefore, the public generally exception is unlikely to apply to a large landowner/developer like First West.

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If you have any questions concerning this letter, please  
contact me at (916) 322-5901.

Sincerely,

Kathryn E. Donovan  
General Counsel

A handwritten signature in cursive script, appearing to read "Margaret W. Ellison".

By: Margaret W. Ellison  
Counsel, Legal Division

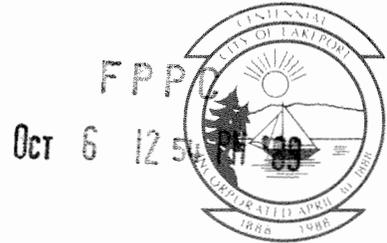
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Enclosures

# CITY OF LAKEPORT

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October 2, 1989



## FAIR POLITICAL PRACTICES COMMISSION

ATTENTION: Legal Department  
428 J Street, Suite 800  
Sacramento, California 95814

Dear Sirs:

A council member is employed by a real estate development company that has developed several commercial properties within the City of Lakeport. The company also owns undeveloped real property in the city, and property outside the city but within its sphere of influence which has been pre-zoned. The development company is also suing the city in federal district court for, among other things, allegedly misleading the developer regarding the City's ability to provide adequate sewer services for a proposed resort hotel project. The City Council is considering the following actions:

- a) Raising sewer connection fees;
- b) Forming an assessment district to finance needed improvements to the City sewer system;
- c) Raising water connection fees;
- d) Raising other city fees that are imposed on property owners/developers at the time a property is developed;
- e) Updating its general plan which contains a amexation policies that could affect property owned by the development company;
- f) Increasing monthly service charges for water and sewer;
- g) Applying for parks grants (the development owns a lakefront resort adjacent to the City Park area);
- h) Developing new capital improvement policies; and
- i) Forming other assessment districts to fund such capital improvements as traffic signals, parks, roads, etc.

The council member has abstained from voting on matters that directly involve his development company/employer and source of income under the Political Reform Act. Guidance is requested as to when the council member should disqualify himself as to the potential actions listed above.

Very truly yours,

  
STEVEN J. BROOKES  
Lakeport City Attorney

SJB/asr

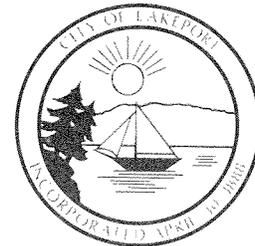
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**CITY OF LAKEPORT**

*Over 100 years of community  
pride, progress, and service*

FPPC

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October 20, 1989

Fair Political Practices Commission  
Legal Department  
428 J Street, Suite 800  
Sacramento, California 95814

Gentlemen:

Pursuant to the request of Arlin Pischke, Council Member, enclosed please find his letter dated October 18, 1989, with additional information for consideration.

We are scheduled to discuss items a) and d) at our next Council meeting on November 6, 1989.

If possible, I would request a response by that date. I will be contacting your office by telephone sometime during the week of October 23, 1989.

Yours very truly,

STEVEN J. BROOKES *hh*  
Lakeport City Attorney

Enc.

SJB:bh

cc - Council Member Arlin Pischke

Mr. Steven J. Brooks, Esq.  
October 18, 1989  
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2. The estimated value of First West Companies' direct ownership is approximately \$3,000,000 or roughly 3/4 of 1% of its total portfolio.
3. The Chief Executive Officer of the firm is Michael J. Leseney, and its President is J. Robert Gilroy. These gentlemen also personally own partnership interest in Lakeport, namely the Will-O-Point, #1 First Street; 290 Main Street; "C" Street via Will-O-Point Associates, Ltd. and Royale Shores Condominiums at #10 Royale Avenue, Lakeport via L&G Associates. Mr. Leseney is the General Partner for both partnerships.
4. If one were to consider the estimated value of the partnership properties combined with my employer's properties in Lakeport (\$10,000,000), the percentage to the whole company is still only 2.5%.

In summary, it is my position that my vote on any of the listed issues would not have a material effect on the net worth of my employer or its officers. That the issue arises out of political motivation in an attempt to use the Political Reform Act to silence the only vocal opposition to increased fees, an issue which the voters should decide in the voting booth. Clearly on any of my employer's projects, I have disqualified myself and would continue to do so.

Please forward these additional facts for consideration immediately, with a copy of your cover letter to me.

Sincerely,

  
ARLIN PISCHKE  
Council Member

AR/kdw

ARLIN PISCHKE  
COUNCIL MEMBER  
CITY OF LAKEPORT

October 18, 1989

Mr. Steven J. Brooks, Esq.  
Lakeport City Attorney  
City of Lakeport  
225 Park Street  
Lakeport, CA 95453

Dear Steve:

Thank you for the copy of your letter dated 10-2-89 to the Fair Political Practices Commission. I believe that these issues have arisen at this time for two reasons:

1. Some form of retaliation against my employer for its present court action with the City; and
2. An effort to use the Political Reform Act to silence my strong opposition to new taxes and fees - a position held long before my present employment.

I am asking you to forward these additional facts to the F.P.P.C. because they are material to their making a fully informed decision.

I am not a stockholder, officer or director of First West Companies.

I do not make management decisions for this firm in my current position as Real Estate Consultant.

The issues on which we have requested a decision affect everyone in the City of Lakeport and not just my employer, and are generic in nature.

The issues do not substantially affect my employer or my employment for the following reasons:

1. First West Companies, a California Corporation, owns, manages or controls a real estate portfolio of over 71 properties in 13 states valued at approximately \$400,000,000. Its Lakeport (and sphere) ownerships are the office building at 55 First Street; the ranch property south of the City; and a partnership interest in property, also south of the City. Additionally, First West Companies' subsidiary, First West Inns, owns the Robin Hill property and restaurant operation north of town and operates a leased restaurant at Will-O-Point in the City of Lakeport.



# California Fair Political Practices Commission

October 17, 1989

Steven J. Brookes  
City Attorney  
225 Park Street  
Lakeport, CA 95453

Re: Letter No. 89-585

Dear Mr. Brookes:

Your letter requesting advice under the Political Reform Act was received on October 6, 1989 by the Fair Political Practices Commission. If you have any questions about your advice request, you may contact Jeevan Ahuja 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