

October 17, 2012

Charlene Arbogast
P O Box 28
Mendocino, CA 95460

Re: Your Request for Advice
Our File No. A-12-150

Dear Ms. Arbogast:

This letter responds to your request for advice as a member of the Casper South Water District Board of Directors regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").¹ This letter is based on the facts presented; the Fair Political Practices Commission (the "Commission") does not act as a finder of fact when it renders assistance. (*In re Oglesby* (1975) 1 FPPC Ops. 71.)

Additionally, our advice is based solely on the provisions of the Act. We therefore offer no opinion on the application, if any, of other conflict-of-interest laws outside the Act.

QUESTIONS

1. Do you have a conflict of interest in a decision of the Casper South Water District (the "district") regarding a sewer line on your neighbor's property?
2. What should the district do if one of the three members abstains and a quorum cannot be achieved?

CONCLUSIONS

1. Since the decision concerns property within 500 feet of your property, you have a conflict of interest.²

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

² You also asked about another member's potential conflict of interest. Without the other member's consent, we cannot provide advice to a third party.

2. Your board requires a quorum of three, and there are only three members serving. Absent special circumstances, the legally required participation rule (as discussed below) cannot be utilized since presumably two members do not have a conflict of interest in the decision, and the two vacant seats can be filled to achieve a quorum for the decision.

FACTS

You are a director of the district. You stated there are only three directors currently, and three is required to obtain a quorum.

The district is considering moving a gravity sewer line that is located on property adjacent to your property. You stated the line has existed for approximately 40 years without a problem. The line was there before the house was built over the line. In light of the issue, your neighbor has asked the district to pay for the relocation of the line.

You have recused yourself from the decisions. However, with your recusal the district board lacks a quorum and cannot act.

ANALYSIS

Section 87100 prohibits any public official from making, participating in making, or using his or her official position to influence a governmental decision in which the official has a financial interest. A public official has a “financial interest” in a governmental decision, within the meaning of the Act, if it is reasonably foreseeable that the decision will have a material financial effect on one or more of the public official’s economic interests. (Section 87103; Regulation 18700(a).) The Commission has adopted an eight-step standard analysis for deciding whether an individual has a disqualifying conflict of interest in a given governmental decision.³

As a water board member that would be called upon to vote on issues affecting the district, you are a public official that would be making a governmental decision. Thus, the first two steps are satisfied.

Step 3, 4, 5, and 6: What are your economic interests, are they directly or indirectly involved in the decision and is it reasonably foreseeable that the decision will materially affect your interest.

³ Regulation 18700(b) states that to determine whether a given individual has a disqualifying conflict of interest under the Act, proceed with the following analysis: (1) Determine whether the individual is a public official. (2) Determine whether the public official will be making, participating in making, or using or attempting to use his/her official position to influence a government decision. (3) Identify the public official's economic interests. (4) Determine whether that interest is directly or indirectly involved in the governmental decision. (5) Determine the applicable materiality standard. (6) Determine whether it is reasonably foreseeable that the governmental decision will have a material financial effect. (7) Determine if the reasonably foreseeable financial effect is distinguishable from the effect on the public generally. (8) Determine if the public official's participation is legally required despite the conflict of interest.

The only economic interest you asked about was your real property. (Section 87103(d); Regulation 18703.2.) We presume you have an interest in the property of \$ 2,000 or more. Thus, we limit our analysis to this economic interest.

You also noted the decision in question concerned property that was within 500 feet of your property. Real property in which a public official has an economic interest is considered directly involved in a governmental decision when the decision involves real property within 500 feet of the official's property. (Regulation 18704.2(a)(1).) Under Regulation 18705.2(a)(1) any financial effect of a governmental decision your real property is presumed to be foreseeable and material. This presumption may only be rebutted by proof that it is not reasonably foreseeable that the governmental decision will have any financial effect on your real property.

Steps 7 and 8: Public Generally and Legally Required Participation Exceptions.

Even if a public official determines that a decision will have a reasonably foreseeable material financial effect on his or her economic interest, the official may still participate under the "public generally" exception if the financial effect of the decision on his or her economic interests is indistinguishable from its effect on the public generally. (Section 87103; Regulation 18707(a).) Your facts do not suggest your property will be affected in a similar manner to all the properties in the district.

Moreover, while Section 87101 permits an official who is otherwise disqualified from making a governmental decision to participate in the decision when the official's participation is legally required, this exception would not apply to your facts. This exception is narrowly construed and applies only where there is no "alternative source of decision consistent with the purposes and terms of the statute authorizing the decision." (Regulation 18708(a)(c); *In re Tobias* (1999) 13 FPCC Ops. 5, copy enclosed.)

In determining whether the "legally required participation" exception applies in the context of a vacancy that could be filled by appointment, we have previously determined that the exception did not apply unless it was legally impossible to fill the vacant position. (*Hunter* Advice Letter, No. A-99-088.) In 1999, in the *Tobias* Opinion, the Commission recognized a limited exception where it was possible to fill the vacancy but other factors existed that warranted the use of the exception, even when the vacancy was the result of the political failure of the appointing authority to fill the vacancy. In reaching this conclusion, the Commission provided the following explanation:

"In determining whether the Rule applied in the context of a vacancy, the Commission looked to a number of factors, which included: the nature of the decision; whether there was an alternative method of decisionmaking consistent with the purpose and functions of the particular agency, whether the agency could have changed the quorum requirements, or appointed alternative or interim members who could vote; whether the decision had to be made within a specified

time period; and the importance of the agency moving forward.” (*In re Tobias*,
supra.)

You have not provided facts to suggest that the *Tobias* opinion’s conclusion may apply to your situation. Thus, we conclude you may not use legally required participation under these facts. We have, however, included a copy of *In re Tobias*. If you believe your facts justify application of the conclusion in the opinion, please contact us for further advice.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini
General Counsel

By: John W. Wallace
Assistant General Counsel
Legal Division

JWW:jgl

Enclosure