

September 18, 2013

David L. Zaltsman
Deputy County Counsel
Marin County Civic Center
3501 Civic Center Drive, Suite 275
San Rafael, CA 94903

Re: Your Request for Advice
Our File No. A-13-083

Dear Mr. Zaltsman:

This letter responds to your request for advice on behalf of Susan Adams, Katie Rice and Steve Kinsey of the Marin County Board of Supervisors regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").¹ Please note this letter is based on the facts presented. The Fair Political Practices Commission (the "Commission") does not act as the finder of fact when it renders advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) There are other bodies of law, separate and apart from the Act's conflict-of-interest provisions, which may apply to your situation. We urge you to check with the Attorney General's office to determine whether any other laws are applicable in light of the facts you present.

QUESTION

Do the three members of the Marin County Board of Supervisors have interests that may be reasonably foreseeably materially financially affected by decisions to adopt a new ordinance that would place new restrictions on properties located in stream side conservation areas ("SCA") under Regulation 18704.2(b)(1)?

CONCLUSION

Yes. The three members have interests in real property and it is reasonably foreseeably that the property will be a materially financially effected by the decision described above.

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.

FACTS

As a Deputy County Counsel for the County of Marin, you ask advice on behalf of three members of the Board of Supervisors, named above, regarding each members' potential conflicts of interest.

For many years, the County of Marin's General Plan has called for an "expanded" stream-side conservation ordinance to "...implement the SCA standards for parcels transverse by or adjacent to a mapped anadromous fish stream and tributary." (Marin Countywide Plan, Implementing Program Bio-4.a at page 2-36.) The Marin County Planning Commission has just recommended a proposed ordinance that will be coming to the Marin County Board of Supervisors for de novo consideration. As proposed, the ordinance would contain various new development restrictions depending on the location of the property on over three thousand (3,000) parcels of real property both developed and undeveloped near defined streams. Specifically, one of the primary restrictions are so-called "set-backs" (and further development restrictions) from the "top of the bank" of perennial, intermittent, and some ephemeral streams.

None of the members of the Marin County Board of Supervisors own real property that will be subject to this new zoning ordinance. However, three members of the Board own real property that is within 500 feet of the boundaries of the relevant stream-side conservation area setbacks covering other properties included in the proposed ordinance.

ANALYSIS

You have determined that each of the members of the Board of Supervisors is a public official, will be participating in making a governmental decision and has an interest in real property. You ask whether the real property is directly or indirectly involved under Regulation 18704.2 in city council decisions to amend the general plan and if they may participate in the upcoming discussion, debate and possible adoption of this ordinance or some variation thereof.

The Act's conflict of interest provisions are designed to ensure that public officials will perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interest of persons who have supported them. (Section 81001(b).) Specifically, Section 87100 prohibits any public official from making, participating in making, or otherwise 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 when it is "reasonably foreseeable" that the decision will have a material financial effect on one or more of the public official's interests as specified in Section 87103. (Regulation 18700(a).) The Commission has adopted an eight-step analytical framework to determine whether a public official has a disqualifying conflict of interest in a particular governmental decision. (See Regulation 18700(b)(1)-(8).)

Because Steps One through Step Three have already been satisfied we begin our analysis at Step Four. At Step Four an official must determine whether his or her real property is directly

or indirectly involved in a governmental decision. (Regulation 18704.2). More specifically, you ask whether the decision falls into an exception provided in Regulation 18704.2 (b)(1), so that the council members' real property would be deemed indirectly involved.

Under Regulation 18704.2(a)(1), real property in which a public official has an interest is considered directly involved if the property is located in or within 500 feet of the boundaries of the property that is the subject of the governmental decision. For "directly involved" real property, the reasonably foreseeable financial effects are deemed to be material.

However, Regulation 18704.2(b)(1) contains as the following exception:

"(b) Notwithstanding subdivision (a) above, real property in which a public official has an interest is not directly involved in a governmental decision, but is instead indirectly involved if:

(1) The decision solely concerns the amendment of an existing ordinance or other land use regulation (such as changes in the uses permitted, or development standards applicable, within a particular zoning category) which is applicable to all other properties designated in that category, which shall be analyzed under 2 Cal. Code Regs. Section 18705.2(b)."

You ask whether the exception articulated in this regulation applies to the decisions you have described.

Under Regulation 18704.2(b)(1), real property is indirectly involved in a decision to amend an existing zoning ordinance or other land use regulation if the decision solely concerns changes that would be applicable to all other properties that are designated in a particular category. Regulation 18704.2(a)(2) states that "For purposes of this subdivision, the terms "zoning" and "rezoning" shall refer to the act of establishing or changing the zoning or land use designation on the real property in which the official has an interest." You indicate that the new ordinance, or similar decision would not change the boundaries of the stream side conservation areas but would implement changes that would be applicable to certain, but not all properties located in those areas. Therefore, the exception does not apply and the real property owned by the three Members of the Board of Supervisor would be directly involved in the decisions.

Once an official has determined whether their real property is directly or indirectly involved, Steps Five and Six require an official to determine what materiality standard applies and whether a financial effect is reasonably foreseeable. The financial effect on a real property interest that is directly involved is presumed to be material. (Regulation 18705.2(b).) This presumption may be rebutted by proof that is not reasonably foreseeable that the governmental decision will have any financial effect on the real property.

You have not provided us any facts to rebut that presumption. Therefore, the financial effects on the real properties in which the Board Members have economic interests are presumed be material.

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

Sincerely,

Zackery P. Morazzini
General Counsel

By: Sukhi K. Brar
Counsel, Legal Division

SKB:jgl