

August 8, 2014

Michael A.M. Lauffer
Chief Counsel
State Water Resources Control Board
1001 I Street
Sacramento, Ca 95814

Re: Your Request for Advice
Our File No. A-14-120

Dear Mr. Lauffer:

This letter responds to your request for advice regarding the conflict of interest provisions of the Political Reform Act (the "Act").¹ Because the Fair Political Practices Commission (the "Commission") does not act as a finder of fact when it renders advice (*In re Oglesby* (1975) 1 FPPC Ops. 71), this advice is based solely on the facts presented.

QUESTION

Do the Act's conflict of interest provisions prohibit State Water Resources Control Board member Felicia Marcus from participating in the decision whether to adopt a Total Maximum Daily Load involving the Marina Del Rey Harbor based on her ownership of real property near the harbor?

CONCLUSION

No. Ms. Marcus may participate in the decision whether to adopt a Total Maximum Daily Load involving the Marina Del Rey Harbor because the decision will not have a reasonably foreseeable material financial effect on Ms. Marcus' real property.

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. In addition, your request initially appeared to concern the conflict of interest provisions under Section 1090. After further review, however, we do not believe Section 1090 is triggered by the facts in this matter, and we do not address those provisions in this letter.

FACTS

You request advice on behalf of Felicia Marcus, a member of the State Water Resources Control Board. The following facts are taken verbatim from your letter dated July 3, 2014:

On February 6, 2014, the Los Angeles Regional Water Quality Control Board (Los Angeles Regional Water Board) adopted an amendment to its Water Quality Control Plan for the Los Angeles Region to establish a Total Maximum Daily Load (TMDL) for Toxic Pollutants in Marina Del Rey Harbor. The Marina Del Rey community, which includes the Marina Del Rey Harbor, is an unincorporated community in the County of Los Angeles adjacent to the Venice neighborhood in the City of Los Angeles.

A TMDL is a quasi-legislative planning action and program of implementation for reducing pollutant loads for impaired waterbodies that do not meet existing water quality standards. The Marina Del Rey Harbor is listed as an impaired waterbody for certain toxic pollutants. The goal of the TMDL is to achieve water quality that protects beneficial uses (recreational, aquatic life, wildlife, and fishing) in the Marina Del Rey Harbor.

In order to become effective, the TMDL approved by the Los Angeles Regional Water Board must be adopted by the State Water Board. Following approval by the State Water Board, the TMDL is forwarded to the Office of Administrative Law and United States Environmental Protection Agency for approval. If approved, the TMDL requirements, prohibitions, and implementation plans will be incorporated into the Los Angeles Regional Water Board's Water Quality Control Plan. Parties responsible for pollutants in the Marina Del Rey Harbor identified in the TMDL will be required to reduce pollutant loads in the Harbor to comply with the TMDL. Responsible parties include the Marina Del Rey watershed agencies (Caltrans, City of Los Angeles and Culver City), the County of Los Angeles, and individual boat owners.

The foreseeable methods of complying with the TMDL include: installation of infiltration systems, vegetated swales, sand/media filters, oil/water separators, catch basin inserts, and storm drain cleaning, removal of contaminated sediments in the harbor by dredging, upgrading storm drains, monitoring, replacement of copper-based anti-fouling paints on boat hulls, and imposing controls on Marina Del Rey boat owners. Treating storm water to comply with the revised TMDL is estimated to cost between \$736,000 to approximately \$1.05 million.

Costs for removing or capping contaminated sediments in the Marina Del Rey Harbor range from \$19 million for capping up to \$200 million for complete dredging. The Marina Del Rey watershed agencies and County of Los Angeles will be responsible for these actions.

One particularly important component of the TMDL addresses the amount of dissolved copper in the Marina Del Rey Harbor. One of the primary sources of copper in the Harbor is the paint applied to boat hulls. To comply with the TMDL, boats in Marina Del Rey Harbor will likely need to switch to more environmentally friendly paints that do not contain copper and clean boat hulls more frequently. Based on the State Water Board's analysis, the cost to convert to non-toxic hull paint is approximately \$1,573 to \$1,707 per year for an individual boat owner. Regional Water Board staff anticipates that grant funding would be available to cover the costs of converting to non-copper based paints. The County of Los Angeles and individual boat owners will be responsible for reducing copper discharges to the Harbor.

Ms. Marcus owns real property in Venice, California. The property is a residential, non-rental townhome and has a market value greater than \$2,000. Ms. Marcus's property is located approximately 1,000 feet from the Marina Del Rey Harbor. Ms. Marcus's property does not have a boat slip; the nearest boat slip to her property is estimated to be approximately 1,100 feet away. Based on 2010 census data, the population of Marina Del Rey is 8,866 residents. The area includes 5,455 rental units and 600 condominiums. The population of Los Angeles County is approximately 10 million and the Venice neighborhood has an estimated population of approximately 40,000 people.

On July 28, 2014, you supplied additional facts by email. You stated that Ms. Marcus' property is located on the peninsula, which is a relatively small portion of the watershed for the Marina Del Rey Harbor. It is your understanding that unless the County of Los Angeles determined that this portion of the watershed was a "hot spot" for pollution, something that is unlikely, then it is doubtful that the County would invest resources on the storm drains in the area where Ms. Marcus owns property. However, this is all speculative until the County produces its plan for compliance with the TMDL.

In addition, you stated that although there was some argument put forth that the TMDL implementation might adversely affect marina slip rentals, you are aware of no claims that the implementation would impact real property values in the area where Ms. Marcus owns her townhome.

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. 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.

Your letter eliminates the need to analyze the initial steps of the standard analysis. Ms. Marcus is a public official and you are asking whether she may participate in the TMDL decision in light of the fact that she owns real property in close proximity to the Marina Del Rey Harbor.

Materiality and Foreseeability.

Regulation 18705.2, as amended by the Commission at the April 2014 Commission meeting, defines when a financial effect of a government decision on real property is material, providing in pertinent part:

(a) Except as provided in subdivision (c) below, the reasonably foreseeable financial effect of a governmental decision (listed below in (a)(1) through (a)(13))² on a parcel of real property in which an official has a financial interest, other than a leasehold interest, is material whenever the governmental decision:

. . .

(6) Involves construction of, or improvements to, streets, water, sewer, storm drainage or similar facilities, and the parcel in which the official has an interest will receive new or improved services that are distinguishable from improvements and services that are provided to or received by other similarly situated properties in the official's jurisdiction or where the official will otherwise receive a disproportionate benefit or detriment by the decision;

. . .

(10) Would change the character of the parcel of real property by substantially altering traffic levels or intensity of use, including parking, of property surrounding the official's real property parcel, the view, privacy, noise levels, or air quality, including odors, or any other factors that would affect the market value of the real property parcel in which the official has a financial interest;

. . .

(12) Would cause a reasonably prudent person, using due care and consideration under the circumstances, to believe that the governmental decision was of such a nature that its reasonably

² We note that Regulation 18705.2, as recently amended, contains only subdivisions (a)(1) through (a)(12).

foreseeable effect would influence the market value of the official's property.

Regulation 18706(b) defines “reasonably foreseeable” as follows:

A financial effect need not be likely to be considered reasonably foreseeable. In general, if the financial effect can be recognized as a realistic possibility and more than hypothetical or theoretical, it is reasonably foreseeable. If the financial result cannot be expected absent extraordinary circumstances not subject to the public official's control, it is not reasonably foreseeable.

Thus, Ms. Marcus would have a conflict of interest if there is a “realistic possibility” that the TMDL decision would have one of the material effects listed in subdivisions (a)(6), (a)(10) or (a)(12) of Regulation 18705.2, the three subdivisions potentially implicated in the present situation.

With respect to Regulation 18705.2(b)(6), your facts state that methods of complying with the TMDL likely include, among other things, storm drain cleaning and storm drain upgrading. Historically, under this regulation, an official would always have a conflict of interest where the decision involved construction of, or improvements to storm drains and the real property in which the official had an interest would receive new or substantially improved services.³ Under the recently amended version, however, the official must now receive a unique benefit from the construction or improvement beyond what is provided to a larger segment of the public in order to meet the test under Regulation 18705.2(a)(6). Thus, it is no longer enough, for example, that a decision resulting in the construction of or improvement to storm drains will provide new and improved services to the official.

Here, with respect to the potential improvement to storm drains as a result of the TMDL, your facts reveal that it is doubtful new or improved storm drains will even be installed in the peninsula area where Ms. Marcus owns a townhome because it is unlikely the County of Los Angeles will determine that this area is a “hot spot” for pollution. Indeed, it is practical to assume that the County would not want to spend the extra money for such an upgrade unless it determines a particular area is a real problem. And even assuming the County provided new or improved storm drains to Ms. Marcus’ area, there is no evidence to conclude that her property would receive a unique benefit distinguishable from other similarly situated properties. We thus conclude that there are simply no facts to suggest a realistic possibility exists that Regulation 18705.2(a)(6) will apply to prohibit Ms. Marcus from voting on the TMDL.

³ However, we note that repairs, replacement and maintenance to storm drainage and other similar facilities have been and continue to be considered exceptions to the general rule. (See, e.g., *McLaughlin Advice Letter*, No. A-02-045 [involving the replacement of a drainage system that was damaged during winter storms and flooding in order to restore it to its prior condition].)

We next briefly look to the general tests of materiality in Regulation 18705.2(a)(10) and (a)(12). With respect to Regulation 18705.2(a)(10), you have provided no facts to suggest the TMDL implementation will result in the substantial alteration of such things as traffic levels, privacy, noise levels or air quality near Ms. Marcus' townhome such that they would impact the value of her property. Moreover, under Regulation 18705.2(a)(12), there are no facts to deduce that implementation of the TMDL would influence the market value of the her property. To be sure, you stated that although there is some concern marina slip rentals might be adversely affected, you are aware of no such concern involving the property values in the potentially impacted areas, including the area where Ms. Marcus' townhome is located.

Accordingly, the TMDL implementation will not have a reasonably foreseeable material financial effect on Ms. Marcus' townhome such that she will be disqualified from participating in the decision whether to adopt it.

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

Sincerely,

Zackery P. Morazzini
General Counsel

By: Jack Woodside
Senior Counsel, Legal Division

JW:jgl