

October 15, 2014

Raymond P. Ramirez
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Re: Your Request for Advice
Our File No. A-14-133

Dear Mr. Ramirez:

This letter responds to your request for advice on behalf of Lion's Gate Community Services District (LGCSD) regarding the conflict of interest code 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

Is the LGCSD a local government agency that is required to promulgate a conflict of interest code?

CONCLUSION

Yes. The LGCSD is a public agency for purposes of the Act, and is required to promulgate a conflict of interest code.

FACTS

You serve as legal counsel to the LGCSD, a Community Services District in Santa Clara County. The County has requested that the Directors of the LGCSD adopt a conflict of interest code. The LGCSD board does not believe adoption of the conflict of interest code is required. You provided the following facts.

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.

- The LGCSD was authorized on May 12, 1998 by the Santa Clara Local Agency Formation Commission (“LAFCO”). You stated that the LGCSD was formed at the request of two private entities, Lion’s Gate Golf Partners LLC and Lion’s Gate Estate Partners LLC, and not the public.
- The LGCSD provides services for a country club and the CordeValle subdivision, a residential community with a private constituency of approximately 93 residents on 1,450 acres. Services provided by the LGCSD include sewage collection and maintenance of a wastewater treatment facility.² The services also include homeowners’ association functions such as maintenance of roadways, landscaping, gates, and other common improvements, storm drains and drainage easements, and utilities within the private streets of the CordeValle subdivision.
- You stated that the LGCSD’s long-term purpose is not tied to any government agency in the sense that there is no plan to eventually transfer any assets or facilities to an agency. Rather, the plan is to keep the LGCSD functioning independently from any government entities as much as possible.
- While the County Board of Supervisors has in the past appointed members to the LGCSD Board, it did so only because of a lack of volunteer residents to serve. Ideally, the LGCSD envisions Board membership to be comprised entirely of residents elected by residents. Thus, you state that while the County may have a role in selecting Board members, its authority in doing so is limited and superfluous when community residents are willing to serve.
- The LGCSD’s primary revenue source is property tax assessments. These are charged to residential lot owners and the golf course and resort and constitute almost 100% of its revenues. You stated that the LGCSD does not provide any services to the “general public,” only the residents in the CordeValle subdivision. The LGCSD facilities and infrastructure were all built with private funds. All funding and revenue has been derived solely from either the developer and/or the property owners in the district. The LGCSD funding is entirely independent of any public funds or loans or guaranty of funds.
- The LGCSD Board presently consists of five unpaid volunteer members elected by CordeValle residents. The LGCSD has no employees. All services are provided by independent third party vendors that contract with the LGCSD, none of whom you stated have any financial relationship with any Board members.
- The Santa Clara County Counsel’s Office, as counsel for the County, is the code reviewing body for any conflict of interest code the LGCSD might adopt. The County Counsel’s Office has taken the position that the LGCSD is required to create a conflict of

² You noted many private entities provide these services, you located over 170 privately-owned wastewater treatment facilities.

interest code. It is your belief that the County must take this position because the LGCSD was formed as a CSD.

On August 6, 2014 and October 3, 2014, you provided the following additional information:

- As a CSD, Lion's Gate has an option to access public funds (state revolving funds, funding through private constituency), however has chosen not to.
- The County has limited involvement in the running of the LGCSD. For example, the LGCSD provides tax roll information to the County, which then charges the LGCSD a 1% fee (based on the total amount of the tax roll) for its "collection service." This is similar to other contracts for services with vendors.
- The LGCSD board's relationship with their constituency (and accountability to the constituency) is currently controlled in the LGCSD's governing documents, not based on regulations or statutes. You stated there are built-in controls in governing documents and an enforcement mechanism available to residents.

The LAFCO Process: You also provided a copy of the original Feasibility Study prepared by Pacific Advanced Civil Engineering, Inc., on September 17, 1997, in connection with the LAFCO proposal. The report reflects the analysis of alternative approaches to formation of a CSD and why these other approaches were not satisfactory.

- *Individual Septic Tanks:* Individual Septic Tanks were considered but determined to not be feasible because of groundwater and soil conditions unique to the site.
- *Mello Roos District:* This was not feasible in part because the County was not to be involved in the financing.
- *Status quo:* If no provision is made for the common ownership and operation of the proposed services there will be no coordinated plan for the creation and operation of the Treatment Facility and Water System. There will be no common ownership. There will be no efficient method for the recovery of the expense of installation of the improvements and the continuing cost of operation.
- *Municipal Advisory Council:* A Municipal Advisory Council would have no authority to charge for services provided nor could it provide for operation and maintenance of the Treatment Facility. The CSD could accomplish both the financing of construction of the improvements and, thereafter the structure for collection of operation and maintenance fees. The Board of the CSD will provide a body for the orderly operation of the facility.
- *County Service Area:* The scope of the CSD is site specific and there is no need for a County Wide Service area. Other areas of the County would not benefit from the facilities and would have no interest in the operation or maintenance of the

improvements. The limitation on the size of the facility would not allow for expansion for service to any other County areas hereafter developed.

- *Consolidation with existing districts:* There are no existing districts within the area that provide comparable services. The CSD proposed is site specific and the services to be provided will have no direct benefit to other Community Service Districts that may exist.
- *Annexation to an existing city:* The nearest cities are Morgan Hill and Gilroy. It is not feasible for the annexation to either since each is physically removed from the site. Any such annexation would require annexation of large parcels of undeveloped land between the site and present city limits. Such a scheme would increase the growth potential for the area. Additionally the services provided by the CSD are site specific and cannot be expanded and therefore could be of no benefit to either city.
- *Incorporating a new city:* The narrow scope of the CSD and the availability of other services within the area make the formation of a new city economically unfeasible.

ANALYSIS

An express purpose of the Act, as set forth in Section 81002(c), is that the assets and income of public officials, which may be materially affected by their official actions, should be disclosed, and in appropriate circumstances, the public officials should be disqualified from acting, in order that conflicts of interest may be avoided. To that end, the Act requires specified public officials to disclose their economic interests as provided in Sections 87200-87210, and a broader group of public officials to disclose their economic interests as provided in the conflict-of-interest code of the agency that employs them.³ (Sections 87300-87302.6.)

The term “agency,” as defined in Section 82003 includes a “local government agency.” “Local government agency” is defined as:

“[A] county, city or district of any kind including school district, or any other local or regional political subdivision, or any department, division, bureau, office, board, commission or other agency of the foregoing.” (Section 82041.)

The LGCSD was formed under Government Code Section 61001 et seq. (also known as Community Services District Law) (Section 61000.) The Community Services District Law was substantially rewritten in 2005 by SB 135. According to the analysis by the Senate Rules Committee, the bill provided multiple reforms:

- “Authorizes CSDs to exercise some specific regulatory powers and public services that are similar to the powers and services provided by the underlying counties and cities.”

³ Generally, new agencies have six months to adopt a code (Section 87303); whereas agencies that experience changed circumstances must amend their codes within 90 days. (Section 87306.)

- “Provides statutory cross-references to the following existing laws that apply to CSDs as well as to other local governments” including: election procedures under the uniform district election law; open meetings under the Ralph M. Brown act (applicable to local government agencies); opportunities for initiative, referendum, and recall elections; using the joint exercise of powers act; record retention and destruction; employee relations under the Meyers-Milias-Brown act (an act to promote the improvement of personnel management and employer-employee relations within the various public agencies in the State of California by providing a uniform basis for recognizing the right of public employees to join organizations of their own choice and be represented by those organizations in their employment relationships with public agencies); providing employee benefits; providing public services and facilities just like municipal water districts, sanitary districts, fire protection districts, recreation and park districts, mosquito abatement and vector control districts, library districts, airport districts, and pest abatement districts; annual allocation of property tax revenues; levying benefit assessments with property-owner approval.

Community Services Districts have consistently been recognized as local public entities by the courts, the Commission, and the Attorney General’s Office. (See *Jerry Richmond v. Shasta Community Services District* (2004) 32 Cal. 4th 409, 415; *Dengler* Advice Letter, No. I-13-121; *Snodgrass* Advice Letter, No. I-12-066; 92 Ops. Cal. Ag. 41.) A District so formed under the Community Services District Law is a political subdivision and public agency of the State of California. (*Edgemont Community Services District v. City of Moreno Valley* (1995) 36 Cal. App. 4th 1157, 1159.)

“We consider first whether membership on the board of directors of a community services district is a public office. Government Code section 61200 provides that each community services district shall have a board of three or five directors who shall be elected at large. Thus the position of director is created by law. Directors generally serve four-year terms (Gov. Code, § 61400 & Elec. Code, § 23506) and until their successors qualify (Gov. Code, § 61206). Thus the positions of director are continuing and permanent, not transient, occasional or incidental though incumbents may come and go. The board of directors is the governing body of the district (Gov. Code, § 61300) authorized to provide its inhabitants with water, sewer and garbage services, fire and public protection, recreation facilities, mosquito abatement, street construction and lighting, public airports and transportation services as designated in the petition for formation of the district (Gov. Code, §§ 61600 & 61301). The board of directors has power to legislate by enacting ordinances (Gov. Code, §§ 61223, 61227, 61228, 61229, 61621.5, 61623.4 & Health & Saf. Code, § 13869). It is therefore clear that the law has conferred upon directors of community services districts authority to perform public functions for the public benefit and exercise some of the sovereign powers of the state. Thus the position of director of a community services district meets the definition of public officer set forth in *Rapsey* and is therefore a public office within the doctrine of incompatible public offices. (68 Ops. Cal. Atty. Gen.

337, 344; See also, *Eldridge v. Sierra View Local Hosp. Dist.* (1990) 224 Cal. App. 3d 311.)” (*Ibid.*)

Based on the foregoing, there is no basis to conclude that the LGCSD, expressly formed under the Community Services District Law, would not be a government agency under the Act. (See Sections 82003 and 82041.)

Finally, you have presented arguments as to why LGCSD is still different from other CSDs.⁴ For example you stated that:

1. *The LGCSD was formed by private entities.*

A LAFCO is charged with the power to form new districts by the government code. The Government Code contemplates these petitions to form a CSD may be made by private entities such as occurred in the formation of the LGCSD.

2. *The LGCSD does not serve the public.*

Under the Act, the general public means those persons within the jurisdiction of the official’s agency. (*In re Owen* (1977) 2 FPPC Ops. 77.) Prior to the formation of the LGCSD, the CordeValle residents were served by the County. After the formation of the LGCSD, this portion of the public was served by the LGCSD. The LGCSD continues to serve the public within its boundaries, just like any other CSD.

3. *The LGCSD plans to function independently from any government entities as much as possible.*

The fact that the County Board of Supervisors has in the past appointed members to the LGCSD Board and can in the future, supports the characterization of the LGCSD as a governmental entity. Further, as noted above, in 68 Ops. Cal. Atty. Gen. 337, 344, the attorney general concluded that CSD’s were subject to the incompatible offices doctrine as well as the conflict of interest provisions of Section 1090. Both bodies of law, like the Act, apply only to governmental entities.

4. *The LGCSD has an option to access public funds (state revolving funds), however has chosen not to.*

⁴ You also proposed we analyze the status of the CSD under the factors set forth in *In re Siegel* ((1977) 3 FPPC Ops. 62). In the *Siegel* opinion the Commission developed an analytical framework to determine whether seemingly private entities are public agencies under the Act. For example, in the *Siegel* opinion, the Commission held that a nonprofit corporation formed for the purpose of acquiring and operating a water system was a public agency under the Act. However, “the Siegel factors are not applicable to . . . entities formed pursuant to a statute, by virtue of the statute enabling it . . .” These are clearly local government agencies. (*Weiss* Advice Letter, *supra*; *Crabb* Advice Letter, No. A-97-575.) “When we have advised that such entities are clearly public, it is not necessary to apply the *Siegel* criteria to determine that they are public agencies within the meaning of the Act. (*Siegel* Advice Letter, No. A-81-015; *Alperin* Advice Letter, No. I-94-177.)” (*McGie* Advice Letter, No. I-06-207.)

Private entities would not appear to have access to public revolving funds in the same manner as LGCSD. The fact that the LGCSD has decided not to exercise some of the advantages of being a public entity does not negate the LGCSD's legal status as a public entity.

5. The LGCSD board's relationship with their constituency (and accountability to the constituency) is currently controlled in the LGCSD's governing documents, not based on regulations or statutes. There are built in controls in governing documents and an enforcement mechanism.

In the past the Commission has considered whether internal safeguards and controls of an agency supported a waiver of the Act's requirements and declined to waive the Act's requirements. (See e.g., *Tocher* Advice Letter, No. A-06-165.) In this case, the Act requires a public agency to adopt a conflict of interest code. Having additional internal safeguards is laudable, but does not support a waiver of the Act's requirements.

6. Finally, your letter and the letter from James Matthews of PACE (the firm that assisted the original developers in the formation of the CSD) raised the issue of the potential burden that would result from being subject to the conflict of interest code requirement of the Act.

The development of the code, which would only apply to the five directors, is a relatively simple process that the County could assist with. Additionally, in developing the code, the agency should tailor the limited disclosure categories to the actual duties of the Board Members. Again, the County should be able to assist in the development of the code.

In conclusion, we agree with the County that the LGCSD is a public agency for purposes of the Act and is required to adopt a conflict of interest code.

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
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Legal Division

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