



FAIR POLITICAL PRACTICES COMMISSION

428 J Street • Suite 620 • Sacramento, CA 95814-2329

(916) 322-5660 • Fax (916) 322-0886

August 25, 2014

Elizabeth Cable
Deputy County Counsel III
Del Norte County
918 'H' Street Suite 220
Crescent City, CA 95531

Re: Your Request for Advice
Our File No. A-14-146

Dear Ms. Cable:

This letter responds to your request for advice on behalf of members of the Del Norte County Board of Supervisors 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 assistance (*In re Oglesby* (1975) 1 FPPC Ops. 71), this letter is based on the facts presented. In addition, we do not render advice based on past conduct. (Section 1097.1(c)(2).)

QUESTION

Do members of the Del Norte County Board of Supervisors have conflicts of interest that prohibit them from participating in a decision to make a change order to an on-going construction contract² based on their potential interests in properties that are on the same street as the project?

CONCLUSION

No. It is not reasonably foreseeable that the decision to implement a change order to the original contract will have a financial impact on the underlying real property interests at issue.

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 Because the decision to enter into the original contract is past conduct, we offer no opinion as to the application of the Act, if any, to that contract here.

FACTS

You are an attorney for Del Norte County and write on behalf of three members of the Board of Supervisors. The Board of Supervisors will soon be voting on a change order to a contract that has already been approved. The contract is for a road improvement project called "Pebble Beach Safety Improvement Project ("the Project"), which will widen an existing street, create a shoulder and sidewalk, and improve the condition of the road. The County Engineer has requested a change order to authorize additional funds for the contract due to unforeseen expenses related to patching. The change order would increase the contract amount by 5% to account for patching areas that are also being widened.

The decision currently before the board is whether to approve a 5% increase in the contract amount. The change order describes the need for the 5% increase:

"During construction of the project it was determined that the existing pavement section at the existing fog line was much less than the centerline line of the roadway; staff assumes that this is the result of multiple overlays widening the road a little at a time. As a result, segments of the existing fog line areas had to be rebuilt.

...

"Since the pavement section at the centerline was not reflective of the actual pavement section it was determined that grinding the entire project, as originally planned, would compromise the structural integrity of the roadway. Therefore, grinding the entire roadway was eliminated. However, the "bad spots" still had to be ground and patched so that they would not impact the overlay component of the project. As a result, additional hot mix asphalt (HMA) was used to patch the ground out sections of the roadway."

Pebble Beach Drive is a well-used road along the north coast that has approximately 50 homes on one side of the road and ocean front on the other. Among these homes is one that Supervisor Martha McClure owns and lives in. Another one of the homes was sold by Supervisor Roger Gitlin who is financing the home for the buyer (the "buyer"). The home is now held in a trust of which Supervisor Gitlin and his wife are beneficiaries and Trustees. The Roger and Angela Gitlin Revocable Trust holds the deed to the home. The buyers are paying against the note as they would a mortgage with a financial institution as a lender. Supervisor David Finigan was the buyer's real estate agent in the transaction to sell the Gitlin house. Supervisor Finigan received commission income within the past 12 months from the sale of this house, but has no on-going interest in the house. Both homes are located within 500 feet of the Project.

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 interests as set forth in Section 87103 and that effect is distinguishable from the effect on the public generally. (See also, Regulation 18700(a).)

Are the Supervisors public officials who are making a decision under the Act?

The Supervisors are members of a local government agency and are thereby public officials under the Act. (See Section 82028.) The Supervisors will also be required to vote on a change to the existing contract for the Project and will consequently be making a decision. (See Regulation 18702.1.)

What are the Supervisors' Financial Interests?

A public official has a financial interest in a decision within the meaning of 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, a member of his or her immediate family, or on any one of five enumerated interests. The following interests are relevant to your inquiry:

- An interest in real property in which he or she has a direct or indirect interest of \$ 2,000 or more. (Section 87103(b); Regulation 18703.2.)
- An interest in any source of income, including promised income, aggregating \$500 or more within 12 months prior to the decision. (Section 87103(c); Regulation 18703.3.)

Supervisor Gitlin

Supervisor Gitlin has an interest in "the pro rata share of the interest in real property, sources of income, and investments of a trust in which the official has a direct, indirect, or beneficial interest of 10 percent or greater." (Regulation 18234.) Supervisor Gitlin and his wife appear to be 50% owners of the trust and its assets. The trust's source of income is the buyer of the house who is paying on the note, and the trust's interest in real property is the house the Gitlin's sold to the buyer. Assuming the buyers of the home have paid \$1,000³ or more into the trust of which he and his wife are trustees and beneficiaries, he has a source of income interest in the buyers of the home. (Section 87103(c); Regulation 18703.3.) He also has an interest in the property that is an asset of the trust. (Section 87103(b); Regulation 18703.2.)

³ Supervisor Finigan has a 50% share in the trust. To reach the \$500 threshold for "source of income," the income must be at least \$1,000.

Supervisor Finigan

Supervisor Finigan's only interest appears to be the income earned as commission for representing the buyer in the transaction detailed above. Assuming the income from the sale (which occurred within 12 months of the upcoming governmental decision) was \$500 or more, he has an interest in the buyer as a source of income. (Section 87103(c); Regulation 18703.3.)

Supervisor McClure

Supervisor McClure has an interest in the real property she owns and occupies. We assume that her interest is greater than \$2,000. (Section 87103(b); Regulation 18703.2.) There are no other facts to suggest another financial interest at issue.

Source of Income Financial Interest: Supervisors Gitlin and Finigan

After determining that each of these two Supervisors has a financial interest in the buyer as a source of income, the next question is whether the source of income is directly involved in the governmental decision. A source of income is directly involved in the decision if that person either "initiates the proceeding in which the decision will be made by filing an application, claim, appeal, or similar request" or that person "is a named part in or is the subject of, the proceeding concerning the decision before the official or the official's agency." (Regulation 18704.1.) Because the source of income does not meet these standards, it is therefore only indirectly involved in the decision. (Regulation 18704(a).)

After identifying that Supervisors Gitlin and Finigan have a financial interest in the buyers as a source of income, the next step is to determine whether it is reasonably foreseeable that the governmental decision will have a material financial effect on that interest.⁴ Regulation 18705.3(b)(3) states that the effect on a source of income that is an individual is material if the decision will affect the individual's real property interest "in a manner that is considered material under [the materiality standards for real property]."⁵

Real Property Financial Interest – Supervisors McClure, Gitlin and Finigan

At this point, we add Supervisor McClure to the analysis because she too has an interest in real property that is similar to the real property interest of Supervisors Gitlin and Finigan. A decision is reasonably foreseeable to have a material financial effect on real property if, among other factors, the decision affects "real property value located within 500 feet of the property line of the official's real property. . . ." (Regulation 18705.2(a)(11).) This subdivision contains a caveat, however, allowing the Commission to determine, under the given circumstances, whether

⁴ We do not separately analyze Supervisor Gitlin's interest in the property that is in the revocable trust because we analyze the source of income in relation to the potential impact of the decision on the underlying real property at issue. Therefore, the analysis would be the same.

⁵ This regulation currently refers to a regulatory provision that the Commission has recently changed. We therefore apply new Regulation 18705.2 to determine the material financial effect on real property.

there are facts suggesting there will be no reasonably foreseeable measurable impact on the official's property. Because the officials are merely voting on a change order that calls for grinding and filling patches of discrete areas of the Project, and are not initiating any new projects or altering the scope of the Project, it is not reasonably foreseeable that this specific decision will have a material financial effect on the officials' interests at issue.

Further, there is an explicit exception to the materiality standard for real property that applies to "repairs, replacement, or maintenance of existing streets." (Regulation 18705.2(c)(1).) As mentioned, the change order solely addresses certain repairs that will be added to the existing contract, and does not contemplate any new work. Therefore, this exception to the applicable materiality standard would apply to the decision at issue.

Because it is not reasonably foreseeable that the change order to the contract will have any material financial effect on the Supervisors' interests in real property, they do not have conflicts of interest under the Act.

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

Sincerely,

Zackery P. Morazzini
General Counsel



By: Heather M. Rowan
Senior Counsel, Legal Division

HMR:jgl