

March 18, 2015

Betsy Martyn, Attorney
13 Via Palmira
Palm Desert, CA 92260

Re: Your Request for Informal Assistance
Our File No. I-15-012

Dear Ms. Martyn:

This letter responds to your request for advice on behalf of Elsinore Valley Municipal Water District Board member Nancy Horton regarding the conflict of interest provisions of the Political Reform Act (the "Act").¹

Our advice applies only to the conflict of interest provisions of the Act and not to other general conflict of interest prohibitions such as common law conflict of interest or Section 1090. Because you have not provided details related to specific lease decisions, we are treating this as a request for informal assistance.²

QUESTION

May Board Member Horton participate in decisions to modify the District's lease with Canyon Lake Property Owners' Association (the "Association")?

CONCLUSION

No. Board Member Horton will have a conflict of interest in the decisions to modify the District lease with the Association and may not make, or participate in making these decisions or in any decisions involving a potential lawsuit involving the Association.

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 Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Regulation 18329(c).)

FACTS

Board Member Horton is a newly elected member of the District and was elected to represent one of five districts represented by the Board. The Board Member's district includes the City of Canyon Lake. There are approximately 25,000 residents and 10,000 dwelling units within her district, and 10,600 residents and 4,800 units in the City.³

The residential area of the City is a gated community located around Canyon Lake. The shoreline of the lake and the property underlying the lake are owned by the District. The District utilizes the lake as a drinking water reservoir. The District also leases the shoreline and a portion of the land underlying the lake to the Association for recreational purposes.

The cost of the lease to the Association is about \$1.5 million per year. The lease and other maintenance costs are paid by the Association from a variety of revenue sources, including assessments, fines, fees, and general income from food, beverage, and rentals. The lease expires in 2022 and has been amended several times.

The portion of the lake subject to the lease is a common area available for the use of all City residents. Board Member Horton resides in the City. Board Member Horton and her spouse own a house that is "lake front property."⁴

Shortly before Ms. Horton was elected to the District Board, the Association proposed to the Board modifications to the lease to decrease the Association's payments by about \$250,000 a year. In your March 5, 2014 correspondence, you stated that the proposed amendment at this time does not otherwise modify the terms of the lease. The Association determines how any lease payment savings would be used, including whether to reduce assessments or any other fees.

On February 17, 2015, the Association filed a "claim for damages" against the District seeking a "refund" of the last five years of lease payments to the District. The Association is concerned with "future obligations from rising costs and trying to anticipate" these costs. In your March 5, 2014 correspondence, you stated "the [Association] is withholding payment in an escrow account until the courts decide." You also stated that the District "may consider this a breach of contract." The claim allows the Association to sue the District if it rejects its demands.

³ The Association considers there to be only one "property owner" per dwelling unit, so there are 4,800 "property owners" for Association voting purposes.

⁴ Board member Horton and all property owners within Canyon Lake pay a monthly assessment to the Association of \$245 that provides for the maintenance of common areas (golf course, tennis courts, equestrian area, parks, roads, internal security) and other services. In addition, Board member Horton and her spouse own a boat that they use on the Lake and pay the Association an additional fee of \$230 a year for use of the boat. The Association uses these fees as a source of revenue to help pay the lake lease.

ANALYSIS

Conflict of Interest under the Act:

Section 87100 prohibits any state or local public official from making, participating in making, or using his or her official position to influence a government decision⁵ in which the official has an interest specified in Section 87103. A public official has a “financial interest” in a government 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.⁶ The Commission has adopted a standard analysis for deciding whether an individual has a conflict of interest under Section 87100.

You have indicated that Board Member Horton is a public official who is asking whether she may make or participate in the making of governmental decisions regarding the District’s lease agreement with the Association. In addition, she has financial interests in real property and her personal finances, as she owns “lake front property” and is a member of the Association and pays the Association property owner dues and other fees.

Foreseeability and Materiality:

Regulation 18701 states that for a financial interest that is not explicitly involved in a decision: “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.”

As relevant to your facts, the following factors in Regulation 18701(b) are considered in determining whether the financial effect on an official’s financial interest is reasonably foreseeable:

“(4) Whether a reasonable inference can be made that the financial effects of the governmental decision on the public official’s financial interest might compromise a public official’s ability to act in a manner consistent with his or her duty to act in the best interests of the public.”

“(6) Whether the public official has the type of financial interest that would cause a similarly situated person to weigh the advantages and disadvantages of the governmental decision on his or her economic interest in formulating a position.”

⁵ Despite numerous contacts with you by phone and email, we were unable to obtain precise facts about the decision at issue. Because it appears that your question relates to decisions related to a lawsuit, we assume for purposes of the letter that this is the decision in question.

⁶ Section 87103; Regulation 18700(a).

Your facts indicate that the a reasonable inference can be made that both parties—the District and the Association—are taking positions that have a realistic possibility of ending in litigation, which is often costly for all parties. In the case of a property owner’s association, lawsuits can and often lead to special assessments of its members in order to finance the legal action and expenses. Therefore, a reasonable inference can be made that the financial effects of the decision to modify the lease may compromise Board Member Horton’s ability to act in a manner consistent with her duty to act in the best interests of the public. It would also cause a similarly situated person to weigh the advantages and disadvantages of the governmental decision on his or her economic interest. Accordingly, a financial effect on Ms. Horton’s financial interests is considered reasonably foreseeable.

Real Property: Revised Regulation 18702.2(a) provides a list of circumstances under which the reasonably foreseeable financial effect of a governmental decision on real property in which an official has a financial interest is material. As relevant to your facts, the financial effect will be material if the decision:

- Regulation 18702.2(a)(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 foreseeable effect would influence the market value of the official’s property.”

Your facts indicate that the decision to modify the lease will likely end in litigation and a complaint that the Association has breached the contract. This will undoubtedly affect market value. For instance, if the property were to go on the market, the litigation would have to be disclosed to potential buyers and this may affect the sales price of the property. Therefore, the facts support a finding of materiality under this test.

Personal Financial Effects:

Regulation 18702.5 states that a personal financial effect of a governmental decision on the personal finances of a public official or his or her immediate family is material “if the official or the official’s immediate family member will receive a measurable financial benefit or loss from the decision.” As previously discussed, the effect of the governmental decision would likely result in some measurable financial impact on Board Member Horton’s personal finances, in the form of special assessments, fees or other costs that may be necessary to cover the costs of litigation. Therefore, the facts also support a finding of materiality under this test.

Board Member Horton has a conflict of interest under the Act, and may not make, or participate in making decisions to modify the lease or affecting potential litigation involving the Association.

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

Sincerely,

John W. Wallace
Assistant General Counsel

By: Emelyn Rodriguez
Counsel, Legal Division

ER:jgl