



FAIR POLITICAL PRACTICES COMMISSION

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March 23, 2015

David E. Pipal
Pipal & Spurzem LLP
350 Fifth Street
Hollister, CA 95023-3878

Re: Your Request for Advice
Our File No. A-15-028

Dear Mr. Pipal:

This letter responds to your request for advice on behalf of San Benito County Water District board members John Tobias and Joe Tonascia regarding the conflict of interest provisions of the Political Reform Act (the "Act").¹

Our advice applies only under the conflict of interest provisions of the Act and not under other general conflict of interest prohibitions such as common law conflict of interest or Section 1090.

QUESTION

Do Boardmembers Tobias and Tonascia have conflicts of interest that prohibit them from participating in decisions to: 1) establish a service area to be served with recycled water, and 2) retain a contractor to construct a recycled water pipeline system?

CONCLUSION

No. While it is reasonably foreseeable that the governmental decisions will have a material financial effect on the Boardmembers' financial interests, the effect will be the same as on the public generally.

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

You are District Counsel for the San Benito County Water District and you write on behalf of two board members who hold property interests in the District's boundaries. The District is a Water Conservation and Flood Control District created by a special act of the Legislature in 1953 and has the same boundaries as San Benito County. Five directors are elected to serve corresponding to each of the five supervisorial districts in the County.

The District conducts its water conservation/water management activities via "zones of benefit." In one of these zones, Zone 6, the District instituted a project for the importation of Central Valley Water Project water ("CVP water") into the Zone largely for agricultural purposes. This water enhances groundwater supplies. Also within Zone 6 is the Hollister Urban Area Master Plan, which was jointly developed by the District, City of Hollister, and the Sunnyslope County Water District. One of the projects under the Master Plan is the development of a reclaimed water program, which takes advantage of the additional source of water from the City's sewer facility by delivering to farmers for beneficial uses on their land, thus improving the storage capacity of the City ponds and providing additional water sources in Zone 6. The water will be moved by "laterals" – piping alongside the main water lines. Zone 6 contains more than 75 percent of the landowners in the District's jurisdiction.

The District staff has identified an area of approximately 1,000 acres owned by 25 different landowners that will receive recycled water. Landowners can opt in to the program to receive the recycled water for agricultural purposes, which may supplement current supplies, but can also be interrupted depending on availability. This program offsets existing irrigation needs and the assumption is that CVP water and groundwater supplies will be increased through this program.

If a landowner opts in to the program, the landowner will pay an annual premium to cover: 1) prepayment for water up to a certain limit for that year, 2) reimbursement to the District for capital costs of the project over a period of 20 years, and, 3) operation and maintenance expenses. If the landowner opts in, he or she will pay the same annual charge as other owners who opt in whether or not water is actually ordered. Property owners choosing not to take a service turnout on their property will not pay the annual charge.

Director Tobias: Director Tobias is a farmer/rancher by trade and owns and farms 27.86 acres in Zone 6. The Tobias Family Trust, in which Director Tobias has an equal one-tenth interest with his 9 siblings, owns 171.94 acres also in Zone 6. Director Tobias' interests in real property described above exceed \$2,000 in value.

You state that there is no information available at this point in time to suggest that the use of recycled water on his property would result in financial gain or loss in his agricultural business operation. The benefit, if any, is that Director Tobias would have an additional source of water available for irrigation should CVP water or groundwater sources become unavailable. Because of the drought, the Bureau of Reclamation will not be allocating any CVP water to the

District/Zone 6 for this water year but groundwater supplies remain plentiful. Also, recycled water is potentially of better quality water than groundwater supplies in the service area.

Director Tonascia: Director Tonascia is a farmer who owns and leases land in various portions of San Benito County. He leases 144 acres from 2 property owners in Zone 6. Director Tonascia uses CVP water and groundwater supplies in his farming operation on these properties. Under District rules, either the landowners or Director Tonascia, as lessee, may order the water and the lessee will be responsible to pay the annual charge and any extra charges for water ordered in excess of the annual charge. If he fails to pay, the District will hold the owner responsible to pay for the water ordered.

Each of Director Tonascia's leases exceeds \$2,000 in value. The availability of recycled water to his leased land would not result in either a change in the expiration date or rate of the lease, or in Director Tonascia's actual or allowable use of the property. The availability of recycled water on the properties offer another source for irrigation, which could be of the utmost importance to farming tenant, especially in times of drought. Recycled water will not have a foreseeable impact on his income.

In March, 2015, the Directors will vote to establish the service area to be served with recycled water, retain a contractor to perform the work, approve contracts for the construction of the laterals/turnouts, and adopt regulations and charges for the service area.

ANALYSIS

Section 87100 prohibits any public official from making, participating in making, or using his or her position to influence a governmental decision in which the official has a financial interest. Both Director Tobias and Director Tonascia are public officials under the Act.

Financial Interests:

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 official's interests. (Section 87103.)

(1) A public official has an interest in real property he owns, in which he has a direct or interest, and in any leasehold. An interest in real property also includes a pro rate share of interests in real property of a business entity or trust in which the official owns directly or indirectly a 10% interest or more. (Section 82033.) Director Tobias therefore has a financial interest in the acreage he owns, and in the acreage his family trust owns, both of which are in Zone 6. Director Tonascia has an interest in the leasehold acreage on which he farms.

(2) Each Director also has a business entity interest in the farming business operated on the acreages listed.

Reasonable foreseeability:

The decisions at issue are accepting the suggested service area, approving construction contracts for the laterals, and adopting regulations and charges for the service area. These decisions will create the option of entitlements of recycled water on the real property of both Directors and the charges for the costs associated with the program.

We must first determine whether it is reasonably foreseeable that the decisions will have a material financial effect on either Directors' financial interests. If there is no reasonably foreseeable financial effect, there is no conflict. A material financial effect is reasonably foreseeable if it is "the subject of" the governmental decision. (Regulation 18701(a).) An economic interest is the subject of a governmental decision if, among other factors, it involves an entitlement to the real property. (*Id.*) Additionally, because the farms will be responsible for paying the set fees for the recycled water program, the decisions are reasonably foreseeable to have a financial effect on the business entities.

Materiality

The next inquiry is whether the foreseeable effect on the official's financial interests will be material. A financial effect on a business entity is material if "a prudent person with sufficient information would find it reasonably foreseeable that the decision's financial effect would contribute to a change in the price of the business entity's publicly traded stock, or the value of a privately-held business entity." (Regulation 18702.1(b).) Examples of such situations include authorizing conditions for an activity in which the business entity is engaged, and increase or decrease the financial liability of the business. Because offering an alternative source of water both changes (potentially improves) the conditions for the farm owners, and if the owners opt-in to the program, will create an additional financial liability, we find the decisions will have a material financial effect on both of the Directors' interests.²

Public Generally

If a public official has a conflict of interest, the Act prohibits him from participating in the decision unless the impact on the official is indistinguishable from the impact on the public generally. A financial effect is indistinguishable from the effect on the public generally if:

The decision is made by the governing board of a water, irrigation, or similar district to establish or adjust assessments, taxes, fees, charges, or rates or other similar decisions, such as the allocation of services, which are applied on a proportional or "across-the-board" basis on the official's economic interests and ten percent of

² The Directors also have interests in their ownership and leasehold interests in the real property. Because we find the materiality standard is met for the business entities, we do not separately analyze materiality for business entities. (See Regulation 18702.2 for real property materiality standards.)

the property owners or other persons receiving services from the official's agency.

(Regulation 18707.2(c).)

This provision would apply to allow the Directors to participate in the governmental decisions because each of the standards above is met. The water district is establishing fees and services on a proportional basis for Zone 6 and the Zone contains more than 10 percent of the property owners who receive services from the District.

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

Sincerely,

John W. Wallace
Assistant General Counsel



By: Heather M. Rowan
Counsel, Legal Division

HMR:jgl