

El Dorado County Supervisor - District V
3080 Elf Lane
South Lake Tahoe, CA 96150

Re: Your Request for Advice
Our File No. A-15-063

Dear Ms. Novasel:

This letter responds to your request for advice regarding the conflict of interest provisions of the Political Reform Act (the "Act").¹

Please note that we are only providing advice 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. This letter is based only on the facts presented. 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.)

QUESTIONS

1. Do the Act's conflict of interest provisions prohibit you from making, participating in making and influencing decisions regarding the Meyers Area Plan ("MAP") when you have real property, a business entity, and other financial interests located within the area designated by the plan?
2. If you have a conflict, what limits are placed on your ability as a member of the El Dorado County Board of Supervisors ("Board") to participate in the MAP?

CONCLUSIONS

1. Based on the fact that your real property interest is located directly within the proposed MAP, we find that decisions regarding the plan foreseeably affect your interests in a material way. Accordingly, you may not make, participate in making, or use your position to influence any decisions regarding the MAP, as discussed below.

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 the County Supervisor for El Dorado County, District V. A new area plan is being developed for the unincorporated community of Meyers, located within your jurisdiction. You described the following interests:

- You and your husband own 23% of a parcel located within the commercial strip area of the plan, valued at approximately \$700,000. The value of your pro rata share of the fair market value is \$161,000.
- You and your husband also own 50% of a corporation, a mortgage and investment company, located on the parcel.
- Additionally, you and your immediate family own 1.4% of a fund that owns a separate piece of property, valued at \$500,000, also located within the Meyers Area Plan.
- Lastly, your business has a secured loan on another piece of residential property located within the plan.

The original Meyers Community Plan adopted in 1993 was a 155 acre commercial development for a 2-mile corridor of the commercial strip area. The new plan has expanded to approximately 669 acres which includes mixed-use, recreation, and residential areas surrounding and including the Meyers commercial strip.

The MAP is a specific plan² with elements supplementing the Lake Tahoe Regional Plan and the El Dorado County General Plan. It includes changes to zoning and allowable uses within the commercial strip. Your facts indicate there are less than 100 businesses within the commercial strip and approximately 3,000 residents within the MAP. According to the United States Census Bureau, El Dorado County has approximately 4,200 businesses and a population of 183,000.

² According to the most recent draft of the Meyers Area Plan, the legal authority and requirements for the MAP are provided in "Chapter 13 (Area Plans) of the TRPA [Tahoe Regional Planning Agency] Code of Ordinances, and Chapter 17.22.XI (Specific Plan) of the El Dorado County Zoning Ordinance."

- Any real property in which the public official has a direct or indirect interest of at least \$2,000. (Section 87103(b).)
- Any business entity in which the public official has a direct or indirect investment worth at least \$2,000 and any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management. (Section 87103(a) and (d).)
- Any source of income, such as a business entity, from which the official has received income of \$500 or more within 12 months before the decision. This also includes income from any client of the business entity of at least \$500, provided to and received by the public official within 12 months before the decision is made. (Section 87103(c).)
- Any donor of gift(s) amounting to a total of at least \$460 within 12 months before a decision is made. (Section 87103(e).)
- A public official's own personal finances, or those of a member of his or her immediate family. (Section 87103.)

We focus on your interests in real property. From the facts you provided, you have a financial interest in the parcel because you have a 23% interest worth approximately \$161,000.

1. Foreseeability and Materiality:

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 the official, the official's immediate family, or the official's interests, and it is distinguishable from the effect on the public generally.

The financial effect on an official's real property interest is presumed to be reasonably foreseeable if the property is the subject of a governmental decision. (Regulation 18701(a).) Real property is the subject of a decision when "the decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the financial interest, and includes any governmental decision affecting a real property financial interest as described in Regulation 18702.2(a)(1)-(6).

A financial effect is material pursuant to Regulation 18702.2(a) if the decision:

reasonably foreseeable.

Because we conclude you have a conflict of interest based on your property, we do not analyze your other interests. If you should dispose of your real property interest you should seek additional advice.

2. Public Generally

A public official is prohibited from making, participating in making, or influencing governmental decisions if the reasonably foreseeable material financial effect is distinguishable from the public generally.

Regulation 18703 states the financial effect is indistinguishable if “a significant segment of the public is affected and the effect on his or her financial interest is not unique compared to the effect on the significant segment.”

A significant segment of the public consists of at least 25% of all real property, commercial real property, or residential real property within the official’s jurisdiction.

Regulation 18703(d) defines “jurisdiction” as “the region, county, city, district or other geographical area in which [the agency] has jurisdiction” or “the designated geographical area the official was elected to represent, or the area to which the official’s authority and duties are limited if not elected.” You have not provided specific facts about property in the MAP versus that in your election district or the county. However, it would not appear that the number of properties in the MAP would meet the 25% threshold in either case. Thus, the exception would not apply.

3. Disqualification

Since you have a disqualifying financial interest, you are prohibited from voting on, directly participating in, or influencing any discussions with other members of the Board of Supervisors, in matters concerning the MAP.

Please note that you are similarly prohibited from voting on, directly participating in, or influencing any decisions with other members of the Tahoe Regional Planning Agency’s

³ There is a narrow exception to this standard in Regulation 18702.2(c)(2) applicable to general plans. Your facts indicate the MAP is a specific plan with elements amending and supplementing the Lake Tahoe Regional Plan and the El Dorado County General Plan. Therefore, you do not meet the requirement of the exception.

appoints a person, obligates or commits his or her agency to any course of action, or enters into any contractual agreement on behalf of his agency.” (Regulation 18704(a).) Participating in a decision occurs when the official “provides information, an opinion, or a recommendation for the purpose of affecting the decision without significant intervening substantive review.” (Regulation 18704(b).) Lastly, an official uses his or her position to influence a decision if the official contacts or appears before any official in his or her agency for the purpose of affecting a decision. (Regulation 18704(c).) In addition, contacting any staff for the purpose of affecting a decision would be considered using your official position to influence a decision, which is also prohibited. (Regulation 18704(c)(1).) Therefore, you may not discuss MAP related matters with your assistant, staff, or consultants unless you are doing so in a ministerial capacity, such as carrying out the decisions made by the other members of the Board, without exercising any individual judgment. (Regulation 18704(d)(1).)

In addition, Section 87105 and Regulation 18707 require you to publicly identify each type of financial interest involved that gives rise to the disqualifying conflict of interest. The identification must be made after the announcement of the agenda item to be discussed or voted upon, but before the discussion or vote commences. You must also recuse yourself and leave the room after identifying the forms of conflict.

Exceptions

A. Personal Interests

Regulation 18704(d)(2) expressly provides an exception where an otherwise disqualified official appears in the same manner as any other member of the general public before the official’s own agency in the course of its prescribed governmental function to represent the official’s own personal interests.⁴

Under Regulation 18704(d)(2)(A)-(C) “personal interests” include: “(A) Real property owned *entirely* by the official, members of his or her immediate family, or the official and members of his or her immediate family; (B) A business entity owned *entirely* by the official, members of his or her immediate family, or the official and members of his or her immediate family; or (C) A business entity over which the official, members of his or her immediate family,

⁴ Where the exception does apply, your comments must be limited to your personal interests, and care should be taken to clarify that you are not acting in any official capacity. Thus, the exception would not permit you to appear before the Board to represent any other person’s interests or the interests of any group.

In addition, Regulation 18704(d)(4) provides that where you communicate with the general public or the press, such communications are not considered an attempt to use your position to influence a governmental decision, whether you speak regarding your own interest or the interests of others. This would include speaking at other public meetings of the city.

Additionally, the Act would not prohibit you from obtaining information otherwise available to the public. However, other contacts, including those with staff, regarding a decision in which you have a conflict of interest may be considered "influencing" the decision.

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

Sincerely,

Hyla P. Wagner
General Counsel



By: Kelly Liang
Legal Intern, Legal Division

KL:vl

ITEM DESCRIPTION

Advice Letter No.	15-063	Requestor	Sue Novasel
Regulation Project No.			
Other (describe)			

Received By FPPC On:	04/08/15	Due Date:	05/07/15
Assigned To:	Emelyn/Intern	Date To Assignee:	04/09/15
Date sent to AG/DA (if 1090)		Date AG/DA respond, if any	

REVIEWERS	Date To Review	1st Approval & Date (Including Regulation Notices)	Date To Review	Final Approval & Date (Incl. Regulation Adoption Memos)
Proofed		VLL		
Senior		ECR		
TAD Chief (SEI, Campaign, Conflict of Interest Code letters)				
Assistant GC		JWW		
General Counsel				
Executive Director (discretion of GC)				
Chair (discretion of GC)				