



STATE OF CALIFORNIA  
FAIR POLITICAL PRACTICES COMMISSION  
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October 29, 2020

Jesse W. Barton  
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112 I St., Suite 240  
Sacramento, CA 95814-2865

Re: Your Request for Advice  
**Our File No. A-20-121**

Dear Mr. Barton:

This letter responds to your request for advice on behalf of Jeff Kerns, Board Member of the Tuolumne Utilities District, regarding the conflict of interest provisions of the Political Reform Act (the "Act").<sup>1</sup>

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.

Also note that we are not a finder of fact when rendering advice (*In re Oglesby* (1975) 1 FPPC Ops. 71), and any advice we provide assumes your facts are complete and accurate. If this is not the case, or if the facts underlying these decisions should change, you should contact us for additional advice.

### QUESTION

1. Does consideration of the Water and Sewer Agreement between the Tuolumne Utilities District and the developers of the Stone Mill Development Project have a reasonably foreseeable and material financial impact on Director Kerns' financial interests such that his participation would be prohibited under the Act?
2. If Director Kerns has a disqualifying financial conflict of interest, may he nevertheless participate to the extent his participation is legally required for the action or decision to be made?

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<sup>1</sup> 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.

## CONCLUSION

1. Yes. Director Kerns has a disqualifying financial interest in the developers of the Stone Mill Development Project as clients of his title company, such that he is precluded from participating in discussion and consideration of the Water and Sewer Agreement and any attendant CEQA documentation.
2. No. Based on the facts provided, the Tuolumne Utilities District may not invoke the legally required participation exception because it can convene a quorum of Directors who do not have 87100 conflicts of interest with respect to the decision.

## FACTS AS PRESENTED BY REQUESTER

Tuolumne Utilities District (“TUD”) is the largest water and sewer provider in Tuolumne County. TUD provides water and sewer service based upon established fees, charges, and rates that are set in its Water Rules and Regulations and its Sewer Ordinance. When a large development project is proposed (i.e. one that requires new infrastructure or upgrades), TUD requires the project proponent to work out an agreement through which the type, timing and extent of the various improvements are agreed upon (“Water and Sewer Agreement”). The costs associated with TUD connecting to these newly installed or upgraded facilities are fixed by the TUD Rules and Regulations or Sewer Ordinance and these costs are included in the Water and Sewer Agreement. Once the improvements are completed, the developer pays any necessary fees, and TUD connects to the improved system, water and sewer is provided to the new development on the same terms that TUD provides to other customers.

TUD is governed by a five-member Board of Directors, which in part, reviews and ultimately approves Water and Sewer Agreements. You provided further information via email that pursuant to the State Water Code, a majority of the Board constitutes a quorum, that is three of the five members. And likewise, three affirmative votes are required for any ordinance, resolution or motion to be passed or become effective. (Wat. Code, Secs. 30524-30525.) The Board is currently comprised of the following members: Barbara Balen, Jeff Kerns, Ron Kopf, Ron Ringen and Bob Rucker.

A project called the Stone Mill Development (the “Project”) will develop three commercial parcels in Tuolumne County. In 2017, the County of Tuolumne Planning Commission approved the site development permit and CEQA documentation for the Project. A local group appealed the Planning Commission’s decision to the Tuolumne County Board of Supervisors. On April 4, 2017, the Board of Supervisors held a hearing to consider the appeal. At that hearing, TUD director Ron Kopf spoke and urged the Board of Supervisors to approve the project. In addition, TUD director Barbara Balen spoke and urged the Board of Supervisors to reject the project. The Board of Supervisors ultimately approved the project.

The same local group that appealed the planning commission’s decision to the Board of Supervisors then filed a lawsuit challenging the California Environmental Quality Act documentation for the Project. The court ruled that the CEQA documentation was adequate and rejected the challenge.

This Project will require a Water and Sewer Agreement between the developer and TUD in order for the necessary water and sewer improvements to be constructed and for water and sewer service to be provided.

You have asserted, that due to Director Balen and Director Kopf taking a public position and advocating for and against this Project, respectively, prior to the same Project coming before the TUD Board for a hearing on the agreement, due process considerations require both of these directors to recuse themselves from consideration of the agreement. (*Nasha v. City of Los Angeles* (2004) 125 Cal.App.4<sup>th</sup> 470.)

Additionally, Director Kerns serves as President and owns a 24.48% of Yosemite Title, an underwritten title insurance company. The company provides title insurance and escrow services to buyers and sellers of real property in Tuolumne County. The developers of the Stone Mill Development Project are customers of Yosemite Title. The charges for the services being provided by Yosemite Title to the developer will amount to approximately \$10,000. You clarified in a follow-up email that Yosemite Title is providing services to the developer both for the Stone Mill Development Project and other matters.

## ANALYSIS

### *Financial Conflict of Interest*

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. 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, distinguishable from its effect on the public generally, on one or more of the public official’s interests. (Section 87103; Regulation 18700(a)). Such interests include:

- An interest in a business entity in which the official has a direct or indirect investment of \$2,000 or more (Section 87103(a)) or in which the official is a director, officer, partner, trustee, employee, or holds any position of management (Section 87103(d)).
- An interest in a source of income to the official, including promised income, which aggregates to \$500 or more within 12 months prior to the decision. (Section 87103(c).) “Income” is defined to include any community property interest in the income of a spouse and a pro rata share of the income of any business entity or trust in which the official (or his or her spouse) owns directly, indirectly, or beneficially, a 10-percent or greater interest. (Section 82030(a).)
- An interest in the official's personal finances, including those of the official's immediate family. This is known as the “personal financial effects” rule. (Section 87103.)<sup>2</sup>

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<sup>2</sup> Effects on an official’s personal finances are not considered separately from the effect on an official's interest in a business entity. (Regulation 18702.5(c).) Thus, we do not consider the personal financial effects rule further.

As Director Kerns owns a 24.48% share of Yosemite Title, and assuming that his pro rata share of income from the developers of the Stone Mill Development Project to the Title company is \$500 or more, he has a source of income interest in this client. (Section 82030(a).)

A financial effect is presumed to be reasonably foreseeable when it is explicitly involved in a decision. Financial interests that are explicitly involved include an interest that is a named party in, or the subject of, a governmental decision. (Regulation 18701(a).) Here, the developers of the Stone Mill Development Project are a named party in, and the subject of the proceeding, as they are seeking the Water and Sewer Agreement with TUD.

Regulation 18702.3(a)(4) then provides that the materiality standard for a decision's effect on a business entity that is a source of income to the official is determined pursuant to Regulation 18702.1. Regulation 18702.1(a)(1) specifies that a reasonably foreseeable financial effect is material if the entity is a named party in a decision coming before the official's agency. Thus, given that the developers of the Stone Mill Development Project are initiating the proceeding for a Water and Sewer Agreement with TUD, the financial effect is material.

As consideration of the Water and Sewer Agreement between the developers of the Stone Mill Development Project and TUD will have a reasonably foreseeable material financial effect on a financial interest of Director Kearns, he is prohibited from participating in the decision.

### *Legally Required Participation*

Even if disqualified under Section 87100, Section 87101 provides that the prohibition does not prevent a public official from making or participating in the making of a governmental decision to the extent his or her participation is *legally required* for the action or decision to be made.

The legally required participation exception contained in Section 87101 has been narrowly interpreted to permit the participation of the fewest financially interested persons possible in any decision. (*In re Hudson* (1978) 4 FPPC Ops. 13; *Gillig* Advice Letter, No. A-96-150; *Hill* Advice Letter, No. I-89-160.) Consequently, Regulation 18705 provides in pertinent part:

(a) A public official who has a financial interest in a decision may establish that he or she is legally required to make or to participate in the making of a governmental decision within the meaning of Section 87101 only if there exists no alternative source of decision consistent with the purposes and terms of the statute authorizing the decision...

(c) This regulation shall be construed narrowly, and shall:

(1) Not be construed to permit an official, who is otherwise disqualified under Section 87100, to vote to break a tie.

(2) Not be construed to allow a member of any public agency, who is otherwise disqualified under Section 87100, to vote if a quorum can be convened of other members of the agency who are not disqualified under Section 87100, whether or not such other members are actually present at the time of the disqualification.

Thus, a public official disqualified under Section 87100 may participate in the making of a governmental decision only if a quorum cannot be convened of other members who are not disqualified under Section 87100.

As stated previously, TUD consists of five directors, of which three are required to convene a quorum and transact business. According to the facts provided, only one director is currently disqualified under Section 87100 with respect to the decision at issue. The remaining four directors are not disqualified under Section 87100.

While you have determined that two directors should not take part in the decisions because of due process concerns brought about by their taking a public stance on the Project prior to it coming to TUD, we can express no opinion regarding any law outside of the Act. Your determination, however, does not affect the analysis under the Act as the legally required exception only allows an otherwise disqualified official to take part in a decision when too many officials are disqualified from a decision under the provisions of the Act. Indeed, allowing an official disqualified under the Act to take part in a decision because fellow directors previously, and by their own volition, expressed their positions regarding the matter would allow for the circumvention of the Act's conflict of interest provisions. Therefore, TUD may not invoke the legally required participation exception to allow a director otherwise disqualified under Section 87100 to vote because a quorum can be convened of other directors who are not disqualified under Section 87100.

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

Sincerely,

Dave Bainbridge  
General Counsel



By: Erika M. Boyd  
Senior Counsel, Legal Division

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