May 3, 2005

John A. Ricker
Land Use and Water Resources
Program Coordinator
County of Santa Cruz
Health Services Agency
701 Ocean Street, Room 312
Santa Cruz, CA 95060-4073

Re: Your Request for Advice
Our File No. A-05-084

Dear Mr. Ricker:

This letter is in response to your request for advice regarding your duties as a Land Use and Water Resources Program Coordinator for Santa Clara County under the conflict-of-interest provisions of the Political Reform Act (the "Act").[1]

QUESTION

May you make, participate in making, or influence governmental decisions in connection with the formation of a community facilities district ("CFD")?

CONCLUSION

You may participate in decisions involving the formation of the CFD, so long as those decisions will have no financial effect on your real property.

FACTS

You are an employee with the County of Santa Cruz, a designated public official who files a Form 700 every year. In one of your job assignments you are presently serving as technical staff for the Board of Supervisors and the County Administrative Office (CAO). The county has adopted a resolution authorizing formation of a CFD in the Felton area to fund

[1] Government Code §§ 81000 – 91014. Commission regulations appear at Title 2, §§ 18109-18997, of the California Code of Regulations.

the purchase of a privately-owned water system. The CAO, the board and the bond counsel have made the decision that the boundaries of the district should be limited to those properties which currently obtain water supply from the water company. You were requested to utilize available information to determine the boundaries of the area that is presently served by the water company (approximately 1,350 customers). If the district formation and the assessments are ultimately approved by the voters, assessments will be levied on each property based strictly upon the size of the water meter or other form of connection to the water company. Properties within the district that have private wells and do not have water service will be exempt from the assessments. You have requested to administer the collection of assessments on the tax bill, if the assessment is authorized. You have not prepared any of the reports or resolutions that have been considered by the board to date.

You own a developed residential property outside but adjacent to the proposed district. Your property is served by a private well and you have no plans to ever connect to the water company. There is no potential to split or further develop your property.

ANALYSIS

Step One: Are you a "public official?"

As a designated employee of the County of Santa Cruz, you are a "member, officer, employee, or consultant of a state or local government agency" and, therefore, are a "public official" subject to the conflict-of-interest provisions of the Act. (§ 82048; Reg. 18701(a).)

Step Two: Are you making, participating in making, or influencing a governmental decision?

A public official "makes a governmental decision" when the official, acting within the authority of his or her office or position, votes on a matter, obligates or commits his or her agency to any course of action, or enters into any contractual agreement on behalf of his or her agency. (Reg. 18702.1.) A public official "participates in a governmental decision" when, acting within the authority of his or her position and without significant substantive or intervening review, the official negotiates, advises or makes recommendations to the decision-maker regarding the governmental decision. (Reg. 18702.2.) A public official is attempting to use his or her official position to influence a decision if, for the purpose of influencing, the official contacts or appears before any member, officer, employee, or consultant of his or her agency. (Reg. 18702.3.)

You ask whether you may participate in decisions relating to the Felton CFD. You would be providing information and recommendations to the CAO concerning the district. Thus, you would be considered to be participating in the decisions as defined in the Act.

Step Three: What are your economic interests?

Under section 87103 of the Act, there are six different types of economic interests that may result in a conflict of interest for a public official. Your question concerns real property

you own adjacent to the proposed district. A public official has an economic interest in any real property in which the public official has a direct or indirect interest worth $2,000 or more in fair market value. (§ 87103(b); Reg. 18703.2.) We assume that you have an interest in your property worth $2,000 or more.

Step Four: Are your economic interests directly or indirectly involved in the decision?

In order to determine if a governmental decision's reasonably foreseeable financial effect on a given economic interest is material, it must first be determined if the official's economic interest is directly involved or indirectly involved in the governmental decision. (Reg. 18704(a).) Pursuant to regulation 18704.2, real property in which a public official has an economic interest is directly involved in a governmental decision if:

> "(1) The real property in which the official has an interest, or any part of that real property, is located within 500 feet of the boundaries (or the proposed boundaries) of the real property which is the subject of the governmental decision."

You stated that your property was adjacent to the proposed boundaries of the CFD. Thus, your economic interest is directly involved in the CFD decisions.

Step Five: Will the financial effect of the decision on your economic interest be material?

Once the degree of involvement is determined, step 5 of the conflict of interest analysis addresses the applicable materiality standard. Regulation 18705.2 sets forth the materiality standards for real property economic interests. The financial effect of a governmental decision on real property that is directly involved in the decision is presumed to be material. This presumption may be rebutted by proof that it is not reasonably foreseeable that the governmental decision will have any financial effect on the real property. (Reg. 18705.2(a)(1).)

You stated that under the current proposal, assessments will be levied on each property based strictly upon the size of the connection to the water company. Properties within the district that have private wells and do not have water service will be exempt from the assessments. You own a developed residential property outside but adjacent to the proposed district. Your property is served by a private well and you have no plans to connect to the water company. Thus, it appears it is not reasonably foreseeable that you will be affected by the CFD assessments. However, the Commission does not act as a finder of fact when providing advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) Therefore, you must apply this test on a case-by-case basis.

Please note, that since property is presumed to be materially affected by the decision, you may only participate in the decision if you can show there will no financial effect on your property -- not even one penny's worth. Thus, should the nature of the decisions change, you

may need to disqualify from the decision. Finally, our advice is limited to the facts presented. (§ 83114.)

Step Six: Will the financial effect of the decision on your economic interest be reasonably foreseeable?

An effect is considered "reasonably foreseeable" if the effect is "substantially likely." (Reg. 18706; *In re Thorner* (1975) 1 FPPC Ops. 198.) Whether the financial consequences of a governmental decision are substantially likely at the time the decision is made is highly situation-specific. A financial effect need not be a certainty to be considered reasonably foreseeable. On the other hand, if an effect is only a mere possibility, it is not reasonably foreseeable.

Steps Seven & Eight: Public Generally & Legally Required Participation

An official who otherwise has a conflict of interest in a decision may still participate under the "public generally" exception. This exception applies when the financial effect of a decision on a public official's economic interests is substantially similar to the effect on a significant segment of the public. You have not provided facts suggesting that the CFD will affect a large enough segment to meet the requirements under the regulation.

Additionally, in certain rare circumstances, a public official may be called upon to take part in a decision despite the fact that they may have a disqualifying conflict of interest. This "legally required participation" rule applies only in certain very specific circumstances where the government agency would be paralyzed from acting. Your account of the facts does not suggest that this exception might apply here.

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

Sincerely,

Luisa Menchaca
General Counsel

By: John W. Wallace
Assistant General Counsel
Legal Division

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