

RAVI MEHTA  
CHAIRMAN



## FAIR POLITICAL PRACTICES COMMISSION

May 2, 1996

Elizabeth Hanna Dixon  
Rutan & Tucker  
611 Anton Boulevard, Suite 1400  
Post Office Box 1950  
Costa Mesa, California 92628-1950

Re: Your Request for Advice  
Our File No. I-96-024

Dear Ms. Dixon::

This is in response to your request for advice regarding the conflict-of-interest provisions of the Political Reform Act (the "Act")<sup>1</sup> as they pertain to Mayor Steve Herfert.

### QUESTION

Mayor Herfert filed a malicious prosecution action against BKK Corporation, a landfill operator. May he participate in city council decisions regarding BKK Corporation and the landfill?

### CONCLUSION

While the circumstances presented may create the appearance of a conflict of interest, Mayor Herfert currently does not have an economic interest in decisions concerning BKK Corporation. Under the Act, a conflict of interest exists only where an official's economic interest is involved in a decision. Consequently, Mayor Herfert is not prohibited from participating in decisions concerning BKK Corporation and the landfill, until such time as BKK Corporation becomes a source of income to him.

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<sup>1</sup> Government Code Sections 81000-91015. All statutory references are to the Government Code unless otherwise indicated. Commission regulations appear at 2 California Code of Regulations, Sections 18000-18995.

### FACTS

In early 1994, Steve Herfert, a West Covina City Councilmember was sued for trade libel by BKK Corporation, the local landfill operator. The councilmember had expressed a concern that residents living near the landfill would contract cancer. A major issue in the city council election was the continued operation of the landfill. Councilmember Herfert, who does not live near the landfill, was reelected and is now Mayor.

The city defended the councilmember and the complaint was dismissed on a demurrer and motion to strike under the anti-SLAPP statutes. Minimal attorneys fees were awarded to the city, but have not been collected. Councilmember Herfert had no financial liability as a result of the case.

In December 1995, Mayor Herfert filed a malicious prosecution action against BKK Corporation, stemming from the 1994 trade libel action. Although Mr. Herfert is seeking \$3.5 million in damages, the mayor's attorney has stated that the new lawsuit is more of a political message than an expectation of recovering money.

### ANALYSIS

Section 87100 of the Act prohibits any public official from making, participating in making, or otherwise using his or her official position to influence a governmental decision in which the official has a financial interest. As Mayor of the City of West Covina, Mr. Herfert is a public official under the Act. (Section 82048.)

Section 87103 sets forth economic interests which are potentially disqualifying financial interests under the Act:

An official has a financial interest in a decision within the meaning of Section 87100 if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official or a member of his or her immediate family or on:

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(c) Any source of income, other than gifts and other than loans by a commercial lending institution in the regular course of business on terms available to the public without regard to official status, aggregating two hundred fifty dol-

lars (\$250) or more in value provided to, received by or promised to the public official within 12 months prior to the time when the decision is made.

Section 87103(c)

At the present time, Mayor Herfert has filed a lawsuit against BKK Corporation ("BKK"). However, he does not have an economic interest in BKK which would prohibit his participation in any decisions regarding BKK. Whether it is reasonably foreseeable that he may have an economic interest in BKK in the future will be determined by the facts and outcome of the lawsuit.<sup>2</sup> Additionally, the lawsuit could be dropped or dismissed, as was the initial action.

You stated that the city council will be making several decisions regarding the BKK Corporation landfill, although we do not have any specific facts regarding the nature of the decisions. If at some point in time BKK becomes a source of income to Mayor Herfert, he may not participate in any decisions in which BKK Corporation is directly involved. (Regulation 18702.1(a)(1)). As a named party or the subject of a proceeding, BKK would be considered directly involved in a decision. (Regulation 18702.1(b).)

If as a result of the litigation, BKK would have to pay attorney fees, costs or damages to Mayor Herfert, BKK would be considered a source of "promised income" to Mayor Herfert (Section 82030(a)), thus prohibiting his participation.

Conversely, if as a result of the litigation, Mayor Herfert would have to pay attorneys fees, costs or damages to BKK Corporation that would be considered a debt from Mayor Herfert to BKK and an outstanding loan from BKK to Mayor Herfert until such time as

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An effect is considered reasonably foreseeable if there is a substantial likelihood that it will occur. Certainty is not required. However, if an effect is only a mere possibility, it is not reasonably foreseeable. (In re Thorner (1975) 1 FPPC Ops. 198.) Commission regulations provide standards for determining whether the foreseeable effect of the decision will be material, depending on the nature of the decision and economic interest involved. (Regulation 18702.)

it is paid by Mayor Herfert. As the holder of an outstanding loan, BKK would be considered a source of income to Mayor Herfert.<sup>3</sup> (Esselstein Advice Letter, No. A-93-468.)

I trust this answers your question.

Sincerely,

Steven G. Churchwell  
General Counsel

  
By: Jill Stecher  
Counsel, Legal Division

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<sup>3</sup> The term "income" as used in the Act includes an "outstanding loan." (Section 82030(a).) An unpaid debt constitutes a loan and as such is considered income under the Act. (Burnham Advice Letter, No. A-87-037.)