



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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March 15, 2016

Minh C. Tran
County Counsel
Office of County Counsel
1195 Third Street, Suite 301
Napa, CA 94559

Re: Your Request for Advice
Our File No. A-16-024

Dear Mr. Tran:

This letter responds to your request for advice on behalf of Napa County Planning Commissioner Jeri Gill 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.

QUESTIONS

1. Does Commissioner Gill have a conflict of interest that would prohibit her from participating in decisions related to changes to the Winery Definition Ordinance ("WDO") and if so, does the public generally exception apply?
2. Does Commissioner Gill have a conflict of interest that would prohibit her from participating in decisions related to the County's Climate Action Plan (the "CAP")?

CONCLUSION

1. To the extent that Commissioner Gill may have a conflict of interest that would prohibit her from participating in WDO decisions, the public generally exception applies, allowing her to participate.
2. Because there is a nexus between the CAP decisions and Commissioner Gill's source of income, she has a prohibitive conflict of interest in the decisions.

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 county counsel for Napa County and you write on behalf of Commissioner Jeri Gill, an appointed member of the Napa County Planning Commission. The Planning Commission's jurisdiction only reaches to the unincorporated areas of Napa County. The Planning Commission will be reviewing changes to various zoning ordinance, including changes to a far reaching zoning ordinance known as the Winery Definition Ordinance ("WDO"), which affects wineries and the wine industry throughout Napa County. Commissioner Gill's husband works part time at a winery, and also consults with wineries to assist in increasing their sales.

The WDO defines "winery" and allows for producing, marketing, and selling wine. The WDO also sets limitations on all ancillary activities on the land other than wine production, such as selling equipment, gifts, or souvenirs, and the providing tours, activities, and events. These activities may only constitute less than 40% of any winery's activities. The WDO also defines the percentage of grapes that must be sourced within Napa County. The WDO can directly or indirectly affect the number of wineries permitted within the county and how many visitors each winery can serve annually.

The Planning Commission will review and discuss amending the WDO as well as other aspects of Napa County ordinances. Specifically, the Planning Commission will assess the following in the WDO:

1. The minimum parcel size for new wineries;
2. The minimum percentage of grapes used in the winery to be grown on-site;
3. Whether to require that new or expanded wineries result in no net loss of vineyards;
4. Whether to require that a majority of employees be directly engaged in vineyard or production operations;
5. What limitations to place on the amount of variance allowed for setbacks on new wineries;
6. Whether to require that wineries include the number of temporary events in their use permit approval as part of marketing tasting room visitation; and,
7. Whether to require different development standards for wineries located in the Agricultural Preserve and Agricultural Watershed zoning districts.

You provided facts to demonstrate that wineries make up just over 35% of businesses in the unincorporated areas of Napa County.

Commissioner Gill also is the Chief Executive Officer of a non-profit corporation, Sustainable Napa County ("SNC") that receives 2/3 of its funding from a private foundation and approximately 1/3 from Pacific Gas & Electric.² The Planning Commission will also be voting whether to approve the County's Climate Action Plan (the "CAP"). Per its website, SNC's projects include the following:

- "Supporting green public policy development countywide, starting with green building ordinances;

² There are occasional, small donations from community members but they are sporadic and inconsequential for the purposes of this analysis.

- Promoting renewable energy action by bringing new approaches to the community and working to reduce traditional barriers to action (such as financing for solar installations for homeowners);
- Helping social service nonprofit organizations become energy efficient and more sustainable; and
- Becoming a comprehensive sustainability resource center for Napa county reaching out to inform and inspire the residents of Napa County where they live, work and play.”

The CAP is still developing, but a prior version of the program listed the following subjects:

- “Chapter 1, Reducing Greenhouse Gas Emissions: California and Napa County, provides an overview of legal and regulatory activity motivating climate action planning in California and in Napa County.
- Chapter 2, 2005 GHG Emissions and 2020 GHG Emissions Projection for Napa County, provides an inventory of greenhouse gas GHG emissions in the unincorporated portions of Napa County in 2005 and projection of GHG emissions to 2020.
- Chapter 3, Emissions Reduction Measures, described both state actions to reduce GHG emissions that will reduce emissions in Napa County and the list of actions that the County will take to reduce GHG emissions by 2020 to meet its reduction target.
- Chapter 4, CEQA Considerations and Tiering, describes the relationship of CEQA to the CAP and how project-level analysis of GHG emissions can utilize the CAP in their project-level CEQA analysis.
- Chapter 5, Monitoring and Adaptive Management, describes how the County will monitor CAP progress over time and how the County will approach climate action planning for the period after 2020.”

ANALYSIS

The Act prohibits a public official from making or participating in making a governmental decision in which the official knows or has reason to know he or she has a financial interest. (Section 87100.) Financial interests include:

- 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).)

Commissioner Gill has a pro-rata interest in her husband's income, including the income of the consulting business that he owns. (Section 82030(a).) To the extent that her husband earns \$1,000³ or more from any winery, Commissioner Gill has an interest in those wineries as well. (See Section 87103(c).)

A non-profit is not a "business entity" under the Act, but Commissioner Gill does have an interest in the income she earns from SNC.

Public Generally

Generally, an effect on the official is indistinguishable from the effect on the public if the official establishes that a significant segment of the public is affected and that there is no unique effect on the official. (Regulation 18703.)

Significant Segment:

A "significant segment" of the public is at least 25% of:

"(1) All businesses or non-profit entities within the officials jurisdiction;

"(2) All real property, commercial real property, or residential real property within the official's jurisdiction; or

"(3) All individuals within the official's jurisdiction."
(Regulation 18703(b).)

The jurisdiction at issue is the unincorporated areas of Napa County. Just over 35% of the total businesses within that jurisdiction are wineries, which the MDO decision will impact. Thus, the threshold is met, and wineries comprise a significant segment of businesses in the county.⁴

Unique Effect:

If there is a "unique effect" on a public official's financial interests, that interest will be affected in a disproportionate manner and the exception will not apply. Based on your facts, the WDO will create standards and rules for all wineries within Napa County. Commissioner Gill's

³ Because she has an interest in 50% of her husband's salary, she meets the \$500 threshold if his income is \$500 or more.

⁴ You also asked what other businesses should be included in this calculation as the "wine industry" could be far-reaching. Because the wineries themselves total 35% of the businesses in the jurisdiction, well above the 25% threshold, we do not reach this issue.

husband works for a winery and consults with others on an occasional basis. Because the WDO will impact all wineries and there is no indication that his financial interests are unique, his interests are not uniquely affected.

The public generally exception applies as to the WDO decisions.⁵

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. Because the public generally exception applies to the WDO decisions, we do not address them further.

To determine if Commissioner Gill has a conflict of interest under the Act with respect to the decision to approve the CAP, we consider whether a financial effect of the decision on one or more of her interests would be reasonably foreseeable. Under the Act, an effect on an interest is presumed foreseeable if the interest is explicitly involved in the decision, and an interest is "explicitly involved" if the interest is a named party in, or subject of, the decision. (Regulation 18701(a).)

In this case, SNC is not explicitly involved in the decision on whether to approve the CAP. Therefore, an effect of the decision on Commissioner Gill's interests is reasonably foreseeable if it can be recognized as a realistic possibility and more than hypothetical or theoretical. (Regulation 18701(b).) While we do not have specific facts regarding the interrelation of SNC and CAP, it seems clear that their goals are similar and it is reasonable to assume there is overlap that could financially impact SNC and its programs.

Different standards apply to determine whether a reasonably foreseeable financial effect on an interest will be material depending on the nature of the interest. (Regulation 18702.) The materiality standards for any particular interest are provided in Regulations 18702.1 through 18702.5. A decision's effect on a source of income is material if "the source is a nonprofit that will receive a measureable financial benefit or loss. ..." (Regulation 18702.3.) Pursuant to Regulation 18702(b), the effect of a decision is not material if it is "nominal, inconsequential, or insignificant." While we do not have sufficient facts to determine whether the CAP decisions' effect on SNC as Commissioner Gill's source of income will be material, we need not conclude either way. Even if the effect is not material, Commissioner Gill could be prohibited from participating based on the nexus test.

Nexus: In addition to the materiality standards for a source of income as described above, there is a special rule for materiality that applies in cases where there is a "nexus" between duties owed to a source of income and to the official's public agency. When another entity pays a public official to accomplish some action that is within the official's public decision-making authority, any

⁵ Because there are no facts to suggest that the exception applies to decisions regarding the CAP, we do not discuss that here.

financial effect on the source of income is presumed material. The "nexus test" is set out at Regulation 18702.3(c):

"Any reasonably foreseeable financial effect on a person who is a source of income to a public official is deemed material if the public official receives or is promised the income to achieve a goal or purpose which would be achieved, defeated, aided, or hindered by the decision."

The rationale for the nexus test is that when an employee earns a salary to accomplish a purpose that may be advanced by what he or she does as a public official, we presume that the private employer is benefiting from the actions of the employee in his or her official capacity. (*Maltbie* Advice Letter, No. A-15-243.) Typically, a "nexus" is found in situations where the official is also a high-level employee with direct influence and control over his or her employer's management or policy decisions. (*Moser* Advice Letter, No. A-03-147; *Low* Advice Letter, No. A-99-305.)

You suggested in your request for advice that the CAP and SNC occupy a similar industry, and the CAP decisions would have an impact on the county generally. Because Commissioner Gill is the CEO of SNC and presumably directs management and policy decisions, and because the CAP and SNC both involve the environmental sustainability of Napa County, it seems reasonable to conclude that the CAP could impact SNC. Commissioner Gill is therefore prohibited from participating in decisions related to the CAP. We have no facts to suggest an exception would apply.

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

Sincerely,

Hyla P. Wagner
General Counsel



By: Heather M. Rowan
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HMR:jgl