



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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September 14, 2021

Linda Schiltgen
Deputy County Counsel
County Administration Center
575 Administration Drive, Room 105A
Santa Rosa, California 95403

Re: Your Request for Advice
Our File No. A-21-108

Dear Ms. Schiltgen:

This letter is in response to your request for advice on behalf of Sonoma County Planning Commissioner Kevin Deas 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 conflicts of interest or Section 1090. 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, then you should contact us for additional advice.

QUESTIONS

1. Does Commissioner Deas have a conflict of interest under the Act that would prevent him from taking part in the Planning Commission meetings to consider public input and make advisory recommendations to the Sonoma County Board of Supervisors (the Board) for the Sonoma County winery events ordinance?
2. Would Commissioner Deas have a conflict of interest under the Act that would prohibit him from taking part in governmental decisions involving the approval of any development application of any project applicant that is a member of Sonoma County Vintners (SCV) if the decision would increase SCV's membership dues?

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 18998 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.

CONCLUSIONS

1. Yes. Commissioner Deas is disqualified under the Act from taking part in the Planning Commission's recommendations to the Board for the Sonoma County winery events ordinance because of the nexus between decisions and the income received from the SCV. Commissioner Deas may not make, participate in making, or influence decisions regarding the winery events ordinance.

2. We decline to provide formal advice in response to this question because it is hypothetical and overly broad; additional facts specific to each governmental decision are needed to enable a full and comprehensive analysis.² If a governmental decision relevant to this question arises, then we suggest that you request our advice at that time and provide facts and information necessary for us to conduct a complete legal analysis.

FACTS AS PRESENTED BY REQUESTER

Commissioner Deas is a member of the Sonoma County Planning Commission. His spouse is the Creative and Social Media Director for SCV, an organization that works with and advocates for local vintners and collects dues from its members. As the Creative and Social Media Director, Commissioner Deas's wife is a paid employee of SCV.

The Planning Commission will be making recommendations to the Board for the drafting of a winery events ordinance. Pursuant to Section 65850, the Board has the authority to adopt ordinances. The Planning Commission studies and reports on a zoning ordinance or amendment as set forth in Section 65853. When considering proposed land use ordinances, the Planning Commission holds at least one public hearing to hear public comments and review, consider and potentially revise staff's recommendations. After the hearing, the Planning Commission votes on the proposed ordinance to recommend to the Board and renders its decision in the form of a written recommendation to the Board pursuant to Section 65855.

The Planning Commission does not have final decision-making authority to adopt an ordinance. Upon receipt of the Planning Commission's recommendation, the Board holds another public hearing to consider the proposed ordinance pursuant to Section 65856-7. The Board may approve, modify or disapprove the recommendation of the Planning Commission, provided that any modification of the proposed ordinance not previously considered by the Planning Commission during its hearing shall be referred to the Planning Commission for report and a recommendation.

² A formal advice request will be declined in writing where the request presents a hypothetical question that lacks a specific issue or accompanying facts necessary to evaluate and analyze the required elements of compliance with the Act. (Regulation 18329(b)(6)(F).)

Later this year, the Planning Commission is scheduled to consider public input and make recommendations to assist the Board with an update to the Sonoma County winery events ordinance. The Planning Commission would conduct a public meeting and vote on its recommended policies. Subsequently, the draft winery events ordinance would be considered by the Board in a public hearing. The Board would again consider public comment and may or may not follow the Planning Commission's recommendations. The winery events ordinance, if approved by the Board, would generally impact the use of land for winery events on parcels throughout the unincorporated area of Sonoma County.

A. History of the Planning Commission's Recommendations to the Board.

There is no history of the Planning Commission's substantive recommendations to the Board being regularly approved without significant amendment or modification by the Board. Although the Board highly respects and values the Planning Commission's recommendations, it does not have a history of rubber stamping the Planning Commission's proposed ordinance recommendations. The Board conducts its own thorough public hearing process. The Board considers the Planning Commission's recommended ordinance, listens to additional public comment, raises additional questions about the recommended ordinance language, and often modifies the substantive provisions of the final approved land use ordinances.

In addition to ordinances, the Planning Commission also considers specific project applications. Where the Planning Commission acts on a specific project applicant's permit, that action is final unless it is appealed to the Board of Supervisors. Many permits for specific projects are not appealed to the Board of Supervisors, but if one were appealed, the Board of Supervisors would consider it de novo.

B. Sonoma County Vintners.

SCV is a nonprofit trade association. It has been active in lobbying and advocacy work related to influencing the winery events ordinance. SCV has directly, and through its members, submitted several comments on the draft winery events policies as they have evolved over the years. However, Commissioner Deas's spouse is not directly involved with those efforts to lobby or influence the drafting of this ordinance.

The Planning Commission's recommendations to the Board regarding the Sonoma County winery events ordinance would not affect the income, investments, or other assets or liabilities of Commissioner Deas's spouse by \$1,000 or more. Commissioner Deas's spouse's income, investments, assets or liabilities are not expected to change at all as a result of the recommendations regarding the winery events ordinance. In the future, it is possible that the winery events ordinance could impact individual winery's membership dues that should be paid to SCV, but that will depend on the terms of the final adopted winery events ordinance and any future winery project applications that may occur in the future.

Based on the facts provided, you do not expect the Planning Commission's recommendations to the Board regarding the winery events ordinance to result in an increase or decrease of SCV's annual gross receipts, or that the value of SCV's assets or liabilities, in an amount equal to or more than: (1) \$1,000,000; or (2) five percent of SCV's annual gross receipts and the increase or decrease is equal to or greater than \$10,000. SCV's dues are structured around

case production. There is no guarantee that new wineries or new winery permits having events would lead to a significant increase in case production caused by the Planning Commission's recommendations regarding the proposed winery events ordinance. It is unlikely that Planning Commission's recommendations about the events ordinance would increase the cost to members of SCV.

C. SCV's Creative and Social Media Director.

SCV's general job description for its Creative and Social Media Director position states:

The Digital Marketing Manager for the Sonoma County Vintners (SCV) plays a central role in the design, production and coordination of digital marketing communications. This position reports to the Director of Marketing and Communications and works closely with the Executive Director and other SCV staff and volunteers. The position has close interaction with the Board of Directors and other internal and external industry partners. The ability to communicate effectively and work collaboratively with internal and external partners in a professional, courteous, and detailed manner is essential.

ANALYSIS

"No public official at any level of state or local government shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest." (Section 87100.) "A public 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, a member of his or her immediate family," or on certain enumerated economic interests including "[a]ny source of income . . . aggregating five hundred dollars (\$500) or more in value provided or promised to, received by, the public official within 12 months prior to the time when the decision is made." (Section 87103(c).)

Under the Act, "income" includes any community property interest in the income of a spouse. (Section 82020(a).) In this case, Commissioner Deas has a source of income in SCV provided his community property interest in his wife's income is \$500 or more in the 12 months prior to the decision.

Making, Participating in Making, or Influencing a Governmental Decision

Section 87100 prohibits a 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. Regulation 18704 defines "making," "participating in making," and "influencing" a governmental decision. A public official "makes a governmental decision" when the official "authorizes or directs any action, votes, appoints a person, obligates or commits his or her agency to any course of action, or enters into any contractual agreement on behalf of the official's agency." A public official "participates in a governmental decision if the official provides information, an opinion, or a recommendation for the purpose of affecting the decision without significant intervening substantive review." A public official "'uses an official position to influence a governmental decision' if the official 'contacts or appears before any official in the official's

agency or in an agency subject to the authority or budgetary control of the official's agency for the purpose of affecting a decision.”

Under Section 87200, members of a “planning commission” are specifically identified as public officials. Thus, even if a planning commission's involvement in a particular ordinance is advisory, as a public official, a planning commissioner is prohibited from making or participating in any decision for the purpose of influencing a decision, which includes making recommendations. Accordingly, Commissioner Deas may not take part in the Planning Commission's decisions regarding the ordinance, including any recommendations to the City Council, to the extent that he is disqualified from the decisions.

Foreseeability

The standard for foreseeability is dependent on whether an interest is explicitly involved in the decision. Regulation 18701 provides that “[a] financial effect . . . is presumed to be reasonably foreseeable if the financial interest is a named party in, or the subject of, a governmental decision before the official or the official's agency.” Here, Councilmember Deas's interests are not explicitly involved in the decision at issue. Thus, under Regulation 18701(b) where an interest is not explicitly involved in a decision, a financial effect need not be likely to be considered foreseeable. In general, if the financial effect can be recognized as a realistic possibility and more than hypothetical or theoretical, then it is reasonably foreseeable. If the financial result cannot be expected absent extraordinary circumstances not subject to the public official's control, then it is not reasonably foreseeable. (Regulation 18701(b).)

Materiality: The “Nexus Test”

Regulation 18702.3 provides the standards for determining the materiality of an official's financial interest in a source of income. Under the “nexus test” set forth in Regulation 18702.3, any reasonably foreseeable financial effect on a source of income to a public official or the official's spouse is material if the decision will achieve, defeat, aid, or hinder a purpose or goal of the source and the official or the official's spouse receives or is promised the income for achieving the purpose or goal. (Regulation 18702.3(b).) 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. (*Garza* Advice Letter, No. A-17-207; *Tran* Advice Letter, No. A-16-024; *Maltbie* Advice Letter, No. A-15-243.)

Here, the facts provided state that Commissioner Deas's spouse is not directly involved with efforts to lobby or influence the drafting of the winery events ordinance. However, based on SCV's job description, SCV's Creative and Social Media Director is required to, among other things, report to the Director of Marketing and Communications, work closely with the Executive Director and other SCV staff, and have close interaction with the SCV Board of Directors and other internal and external industry partners. The Creative and Social Media Director, therefore, is involved with management-level decisions for the purpose of promoting SCV, its membership, and the wine industry in general. Each of these purposes or goals would be aided by a winery events ordinance that allows more special events. Thus, Commissioner Deas is disqualified under the Act because of

the nexus between the decisions relating to the wine events ordinance and the income received from the SCV.

For the above reasons, Commissioner Deas may not make, participate in making, or use his official position to influence decisions regarding the winery events ordinance. (See Regulation 18707.)

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

Sincerely,

Dave Bainbridge
General Counsel

/s/ John M. Feser Jr.

By: John M. Feser Jr.
Senior Counsel, Legal Division

JMF:dkv