



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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February 08, 2022

Ricki Heck
Board Member
Nevada Irrigation District
1036 West Main Street
Grass Valley, CA 95945

Re: Your Request for Advice
Our File No. A-22-005

Dear Ms. Heck:

This letter responds to your request for advice 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.

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

Under the Act, as a member of the Nevada Irrigation District Board of Directors, may you take part in the approval process for a Water Supply Assessment related to a proposed mining project located approximately one mile from your residential real property?

CONCLUSION

The Act prohibits you from taking part in the approval process because your real property is located directly above the mineral rights area owned by the project applicant—that is, directly above a potential mining site—and there is no clear and convincing evidence the project would have no measurable impact on your real property.

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 18109 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.

FACTS AS PRESENTED BY REQUESTER

You are an elected Member of the Board of Directors of the Nevada Irrigation District (NID) located in Grass Valley. NID serves approximately 25,000 customers and its jurisdiction includes a population of nearly 100,000. The Board of Directors will soon be hearing an item regarding a Water Supply Assessment (WSA)—a component of the Environmental Impact Report (EIR) submitted by a mining project proponent, Rise Grass Valley, Inc. (“Rise”). Per the WSA, the primary purpose of the proposed project is operation of the Idaho-Maryland Mine. The proposed project comprises five primary components:

1. Dewatering the existing underground mine workings;
2. Mining existing and new underground workings;
3. Processing gold mineralization and rock;
4. Placing engineered fill at the Brunswick and Centennial Industrial Sites; and
5. Export of engineered fill from the Brunswick Industrial Site to support local construction projects.

The County of Nevada is the lead agency on the project. Your agency, NID, has no authority over the project itself. However, under the Water Code, NID is required to receive and approve the WSA within a 90-day period from the date of submission. According to the WSA, “[t]he Proposed Project is anticipated to receive potable water from [NID] for dust control, sanitary uses, and to provide a reliable water supply to some nearby residences whose water supply wells could be impacted from mining operations. [The] WSA evaluates the adequacy of [NID’s] total projected water supplies, including existing water supplies and future planned water supplies, to meet the existing and projected future water demands, including those future water demands associated with the Proposed Project, under all hydraulic conditions”

Per the WSA, the proposed project is located on two properties owned by Rise—the Brunswick Industrial Site and the Centennial Industrial Site. Of the approximately 175 total surface acres, approximately 104 acres is proposed to be disturbed as a result of the construction of the Proposed Project, including facilities proposed to support dewatering, mining activities and material processing at the Idaho-Maryland Mine. Further, as proposed, Rise retains the subsurface rights to approximately 2,585 acres that encompass the existing historic Idaho-Maryland Mine workings and the proposed project area. As proposed, upon completion of construction of the aboveground facilities, Rise would begin dewatering the mine, performing advanced exploration, and mining the underground mine workings.

Your personal residence of 40 years is located within what you refer to as the “sphere” of the proposed mining project. Most of the homes within the “sphere” of the project, including your own, receive their potable water from private wells. You believe the proposed project has a high likelihood of impacting the well production and quality of water serving the homes within the proposed project’s “sphere.” You subsequently clarified that approximately 300 residences are located within a one mile radius of the proposed mining project site, with an estimated 100-200 residences—including your own—located directly within Rise’s mineral rights area. You noted that the number of wells is a point of contention, however, given that many wells in the area are not included in local records.

You believe that, as proposed, the project has a high likelihood of impacting the well production and quality of the water serving the homes within the area of Rise's subsurface mineral rights. Rise has indicated the proposed project would only affect approximately 31 wells, none of which would impact your real property. However, approximately twenty years ago, another entity, Emperor Gold, proposed a similar mine project involving reopening and dewatering the thousands of miles of underground tunnels. In Emperor Gold's documents, they identified over 100 wells as potentially impacted, including your own. This has given you concern as to the accuracy of the figure provided with respect to Rise's proposed project.

NID does not have existing water lines within the "sphere" of the project. Accordingly, if the project creates a need for new access to potable water because of the project's impact on nearby wells, it would be a major construction project with costs for constructing pipelines, laterals, meters, being borne by the property owners.

As noted, the WSA coming before NID is a portion of the larger EIR, which discusses environmental impacts not included in the WSA. The EIR indicates the proposed project's impacts would generally be either nonexistent, less than significant, or less than cumulatively considerable after mitigation. With respect to some categories of environmental impact, however, the proposed project's impact would be significant and unavoidable. This includes substantial damage to scenic resources, long-term changes in visual character associated with the proposed project in combination with cumulative development, and a substantial temporary increase in ambient noise levels in the vicinity of the project in excess of local standards.

As a member of the public, and not in your capacity as a public official, you have submitted two letters to Nevada County expressing your concerns and questions about the project. You have also asked for a denial of the project based upon what you believe to be unmitigable impacts to the surrounding homes and their water supply.

ANALYSIS

Under Section 87100 of the Act, "[n]o 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." "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 specified economic interests. (Section 87103.) Among those specified economic interests are "[a]ny real property in which the public official has a direct or indirect interest worth two thousand dollars (\$2,000) or more." (Section 87103(b).) You have an economic interest in your residential real property.

Regulation 18701(a) provides the applicable standard for determining the foreseeability of a financial effect on an economic interest explicitly involved in the governmental decision. It states, "[a] financial effect on a financial interest 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. A financial interest is the subject of a proceeding if the decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or

contract with, the financial interest, and includes any governmental decision affecting a real property financial interest as described in Regulation 18702.2(a)(1)-(6).”

Where, as here, an official’s economic interest is not explicitly involved in the governmental decision, the applicable standard for determining the foreseeability of a financial effect on the economic interest is found in Regulation 18701(b). That regulation provides, “[a] financial effect need not be likely to be considered reasonably foreseeable. In general, if the financial effect can be recognized as a realistic possibility and more than hypothetical or theoretical, it is reasonably foreseeable. If the financial result cannot be expected absent extraordinary circumstances not subject to the public official’s control, it is not reasonably foreseeable.”

A WSA is intended to assist local governments in deciding whether to approve a project. (*Citizens for Responsible Equitable Environmental Development v. City of San Diego* (2011) 196 Cal.App.4th 515, 523.) Under the California Water Code, a public water system, such as NID, is required to approve a WSA as part of an EIR under the California Environmental Quality Act (CEQA). (Cal. Water Code Section 10910.) Further, a provision of CEQA requires compliance with the WSA law. (Cal. Pub. Resources Code Section 21151.9.) Accordingly, although NID has no authority over the project itself, it is reasonably foreseeable that NID’s approval or rejection of a WSA could impact the viability of a proposed project. Here, you have stated your belief that the project has a high likelihood of affecting well production and the quality of water serving homes within a large area surrounding the proposed project sites, indicating a reasonably foreseeable financial effect on your real property.

Under Regulation 18702.2(a)(7), the reasonably foreseeable financial effect of a governmental decision on a parcel of real property in which an official has a financial interest, other than a leasehold interest, is material whenever the governmental decision involves property located 500 feet or less from the property line of the parcel unless there is clear and convincing evidence that the decision will not have any measurable impact on the official’s property. Here, although the surface-level project sites are located approximately one mile from your residential real property, the subsurface mineral rights area extends directly below your property. Accordingly, in the absence of clear and convincing evidence that the decision will not have any measurable impact on your real property, the decision would presumably have a reasonably foreseeable, material effect on your real property interest.

With respect to evidence of no measurable impact on your property, you have indicated that you believe the proposed project has a high likelihood of affecting the well production and quality of water serving the homes within Rise’s mineral rights boundaries, which you have termed the proposed project’s “sphere.” You also believe the “sphere” includes “some reasonable distance outside of the boundar[ies], yet to be determined.” Your residence is within that purported “sphere.” Your belief is based, at least in part, on the fact that approximately twenty years ago, another entity, Emperor Gold, proposed a similar mine project involving reopening and dewatering the thousands of miles of underground tunnels. In Emperor Gold’s documents, they identified over 100 wells as potentially impacted, including your own. Accordingly, although the current WSA was prepared by a professional water engineering firm and indicates only 31 wells would be impacted, there does not appear to be *clear and convincing* evidence of no measurable impact on your real property.

As indicated above, a governmental decision’s reasonably foreseeable, material financial impact on an official’s economic interest is not disqualifying if the effect is indistinguishable from

the effect on the public generally. This is commonly referred to as the “public generally exception.” Under the public generally exception, a governmental decision’s financial effect on a public official’s financial interest is indistinguishable from its effect on the public generally if the official establishes that a significant segment of the public is affected and the effect on his or her financial interest is not unique compared to the effect on the significant segment. (Regulation 18703(a).) A significant segment of the public includes at least 15 percent of residential real property within the official’s jurisdiction if the only interest an official has in the governmental decision is the official’s primary residence. (Regulation 18703(b).) Here, however, only approximately 300 residences are located within what you have termed the project “sphere”—that is, the area within one mile of the proposed mine. Approximately 100-200 wells are located directly within the mineral rights area.

You did not provide an exact number of residential real property units within NID’s jurisdiction, but noted that NID has approximately 25,000 customers and a population of nearly 100,000 people. Accordingly, even considering that local records may understate the actual number of wells in the area, it does not appear that the proposed mining project would impact a significant segment of the population—that is, at least fifteen percent of residential real property. Accordingly, the public generally exception does not apply and the Act prohibits you from taking part in decisions related to the project.²

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

Sincerely,

Dave Bainbridge
General Counsel



Kevin Cornwall
Counsel, Legal Division

KMC:dkv

² The Act does not, however, prohibit you from making an appearance as a member of the general public before your agency during a public meeting if your appearance is related solely to real property owned entirely by you, an immediate family member, or you and an immediate family member. (See Regulation 18704(d)(2)(A).) In that instance, after identifying your financial interest, you would recuse yourself from the agenda item, leave the dais, and remain in the room to speak or observe from the area reserved for members of the public. (Regulation 18707(a)(3)(B).)