



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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April 22, 2022

Michelle Bushnell
County of Humboldt
825 5th Street, Room 111
Eureka, CA 95501

Re: Your Request for Informal Assistance
Our File No. I-22-022

Dear Ms. Bushnell:

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. As you have sought general advice and have not yet identified a specific decision before you, we are providing informal assistance.²

QUESTION

Under the Act, may you take part in a decision by the Humboldt County Board of Supervisors to reduce or repeal a tax that applies to commercial cannabis cultivators based on the square footage of cultivated property, given that you own property you plan to use for commercial cannabis cultivation and are also potentially liable for taxes related to other cultivators you are currently allowing to operate on a portion of your property?

CONCLUSION

No, under the Act, a decision to reduce or repeal the tax would affect your economic interest in your real property and, regardless of whether the decision would impact a significant segment of the public, your real property would be uniquely affected due to your above average property area

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 18104 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.

² Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c)(3).)

permitted for commercial cannabis cultivation. However, as explained below, the Board of Supervisors could segment decisions such that you could potentially take part in related decisions that would not have a reasonably foreseeable, material financial effect on your economic interests.

FACTS AS PRESENTED BY REQUESTER

You are a member of the Humboldt County Board of Supervisors (“Board”). In Humboldt County (“County”), there is a “Measure S tax” that applies to anyone in the county who has commercial cannabis cultivated on their property, regardless of whether the cannabis farm belongs to them. Two cannabis farms operate on your land, but you do not own those farms, nor do you receive income from those farms. You receive a Measure S tax in your name. The other farmers operating on your land include your son and a close friend. You have permitted them to use your property and do not charge them for their use. They have previously paid the Measure S tax that you have been assessed for their respective businesses. However, based upon the facts provided, you are ultimately liable for the payment of the tax as the property owner. You are a cannabis farmer, but your cannabis farm is not in production yet, so you have not paid a Measure S tax yourself. You are not certain if you will cultivate in 2022 due to the state of the cannabis market, but you are keeping your farm and will continue to consider cannabis cultivation as a possibility.

The text of the Humboldt County Municipal Code provision imposing the Measure S tax reads:

In addition to any requirements imposed by Title III, each person issued a commercial marijuana cultivation permit shall pay an annual tax of one dollar (\$1.00) per square foot of outdoor cultivation area, two dollars (\$2.00) per square foot of mixed-light cultivation area or three dollars (\$3.00) per square foot of indoor cultivation area regardless of whether or not marijuana is actually grown on such property.

(Humboldt County Municipal Code, Title VII, Div. 1, Section 719-4.) You explained, however, that individuals/businesses are not actually required to pay the Measure S tax if no cannabis is cultivated on their permitted site. Rather, all cannabis cultivators are assessed, but it is the responsibility of the cultivator to let the Humboldt County Planning Department know if they have not cultivated so that their Measure S tax liability is reduced.

The County currently has approximately 1,600 approved commercial cannabis cultivation permits and interim permits with an area of over 434 acres. Under the Measure S ordinance, there can only be ten sites permitted to grow up to eight acres, and six of those permits have been given. You estimate there are approximately ten permits for two-acre grow sites, and the majority of permitted grow sites are one acre or smaller. Your permitted area is 1 acre of outdoor cultivation space on your farm. Your son’s permit is for cultivation of 17,900 square feet and your friend is permitted for 20,000 square feet.

A business license is not required to obtain a commercial cannabis cultivation permit. Including currently licensed businesses, pending and delinquent licenses, and licenses in the renewal process, there are approximately 3,425 business licenses, 515 of which are cannabis business licenses.

The County recently made a decision regarding suspending or decreasing the Measure S tax rate, but you did not take part in the decision-making process. However, you believe the issue may arise again and would like advice on whether you may take part in future decisions regarding changing the Measure S tax rate or suspending the tax altogether. In a follow-up phone call, you stated it is possible that a change could be uniform, such that it would apply to all three categories of cultivation. The Board could alternatively consider a change specifically to indoor and mixed-light cultivation assessment rates, given that they are larger assessments.

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 [their] official position to influence a governmental decision in which [the official] 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:

- Any business entity in which the public official has a direct or indirect investment worth two thousand dollars (\$2,000) or more.
- Any real property in which the public official has a direct or indirect interest worth two thousand dollars (\$2,000) or more.

(Section 87103.) You have an economic interest in your farm as real property.³ Although two farms operate on your real property, you have not received any payment from them and, therefore, they do not currently constitute sources of income.

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).”

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 would impose, repeal, or modify any taxes, fees, or assessments that apply to the parcel. (Regulation 18702.2(a)(3).)

³ You may also have an interest in your farm as a business entity, but given that you currently do not cultivate cannabis and we are unaware of other business operations, we cannot determine if your farm constitutes a “business entity” for purposes of the Act at this time. However, it is unnecessary to make this determination in light of our conclusion that you are prohibited from taking part in decisions based on the effect on your real property.

The Measure S tax effectively operates as a property tax applied to the specific property an individual uses for the cultivation of commercial cannabis. A change to the Measure S tax would repeal or modify a tax or assessment that applies to your property. Therefore, a decision to repeal or modify the Measure S tax would have a reasonably foreseeable, material financial effect on your real property interest and the Act prohibits you from taking part in the decision unless an exception applies.

As Section 87100 indicates, 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." 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 the official's 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 25 percent of all businesses or non-profit entities within the official's jurisdiction. (Regulation 18703(b)(1)(A).)

Under Regulation 18702.1(a)(4), a business entity is materially affected by a governmental decision if a real property interest held by the business entity is the subject of the decision under Regulations 18701(a) and 18702.2(a)(1) through (6). As with your own real property, a change to the Measure S tax would involve the repeal or modification of an assessment applying to the property interests of any permitted business that cultivates commercial cannabis. In Humboldt County, there are approximately 1,600 approved commercial cannabis cultivation permits and interim permits and 515 cannabis business licenses. There are approximately 3,425 business licenses total. The Act defines "business entity" as "any organization or enterprise operated for profit, including but not limited to a proprietorship, partnership, firm, business trust, joint venture, syndicate, corporation or association." (Section 82005.)

Given the above facts, it is not clear whether the number of businesses affected by a change to Measure S taxes constitute a "significant segment of the public" for purposes of the Act. Cannabis business licenses account for approximately 15 percent of business licenses in the County (515/3,425), less than the 25 percent necessary to establish a "significant segment." Further, because commercial cannabis permits do not require a business license, there does not appear to be a feasible way to accurately determine what percentage of businesses in the County would be affected by potential Measure S decisions because we do not know the total number of businesses—both licensed and *un*licensed—for an accurate comparison.

We need not reach a conclusion with respect to whether the decisions would affect a significant segment of the public, however, because, in any case, the decisions would uniquely affect your economic interests. Under Regulation 18703(c)(4), a "unique effect" on a public official's financial interest includes a disproportionate effect on the official's interest in real property resulting from the larger real property size when a decision affects all interests by the same or similar rate or percentage. You are permitted for one acre of commercial cannabis cultivation. There are approximately 1,600 commercial cannabis permits covering an area of approximately 434 acres. Dividing 434 acres by 1,600 permits, the average cultivation site permit appears to be just over one quarter of an acre. Accordingly, a change in the Measure S tax rates could affect your interests up to four times as much as the average farm affected by Measure S taxes. Therefore, it does not appear the public generally exception would permit you to take part in Measure S tax

decisions that would have a reasonably foreseeable, material financial impact on your economic interests.

Finally, you indicated the possibility that consider a change specifically to indoor and mixed-light cultivation assessment rates, given that they are larger assessments (\$2-3 per square foot, rather than the \$1 per square foot assessed on outdoor cultivation). Because your farm is entirely outdoors, it would not be affected by such a decision. Under Regulation 18706, an agency may segment a decision in which a public official has a financial interest, to allow participation by the official, provided all of the following conditions apply:

- (1) The decision in which the official has a financial interest can be broken down into separate decisions that are not inextricably interrelated to the decision in which the official has a disqualifying financial interest;
- (2) The decision in which the official has a financial interest is segmented from the other decisions;
- (3) The decision in which the official has a financial interest is considered first and a final decision is reached by the agency without the disqualified official's participation in any way; and
- (4) Once the decision in which the official has a financial interest has been made, the disqualified public official's participation does not result in a reopening of, or otherwise financially affect, the decision from which the official was disqualified.

If the above conditions are met, you could potentially take part in the properly segmented decisions that do not implicate the Measure S tax rates for outdoor cultivators. However, whether a decision may be segmented is a fact-based determination that can be made only on a case-by-case basis. If you need assistance regarding the segmentation of any particular decision once final decisions regarding whether and how to change the Measure S tax rates for outdoor cultivators, you may wish to seek further advice at that time, identifying the nature of the specific decision.

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

Sincerely,

Dave Bainbridge
General Counsel



By: Kevin Cornwall
Counsel, Legal Division

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