

State of California



Fair Political Practices Commission

P.O. BOX 807 • SACRAMENTO, 95804 • • • 1100 K STREET BUILDING, SACRAMENTO, 95814

Technical Assistance
(916) 322-5662

Administration
322-5660

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322-5901

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322-6441

Statements of Economic Interest
322-6444

8711-2
copy also in 18702(b)(1)

May 6, 1981

Daniel F. Gallery, Esq.
Attorney at Law
926 Jay Building
Sacramento, CA 95814

A-81-05-101

Dear Dan:

This letter is sent to confirm our telephone conversations and our meeting of April 2, 1981, regarding a possible conflict of interest involving a Director of Tuolumne County Water District No. 2.

My understanding of the facts is as follows. A member of the Board of Directors, Neil Burckart, is a general contractor within Tuolumne County whose main business is the paving of parking lots and driveways. In addition, Mr. Burckart owns two or three parcels of land within the county. The issue now before the Board of Directors is the sewer connection fee schedule. Currently, the District charges sewer connection fees as follows:

"1,000 per residential connection, and for all other connections, \$1,000 per single family equivalent connection."

The Board is considering revising this fee schedule so that connection charges for a large development will be based on a declining charge formula and thus, much less than the charges are under the current structure.

The question you posed is whether Mr. Burckart had a conflict of interest within the meaning of the Political Reform Act, Government Code Section 87100, et seq.^{1/} as to the Board decisions on the proposed revisions to the fee schedule.

^{1/} All statutory references made are to the Government Code.

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Section 87100 prohibits public officials from making, participating in making, or in any way attempting to use their official positions to influence a governmental decision in which they know or have reason to know they have a financial interest.

Financial interest is defined in Section 87103 as a reasonably foreseeable material financial effect of the decision on:

(a) Any business entity in which the public official has a direct or indirect investment worth more than one thousand dollars (\$1,000).

(b) Any real property in which the public official has a direct or indirect interest worth more than one thousand dollars (\$1,000).

(c) Any source of income, 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 dollars (\$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.

(d) Any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management.

Under the facts presented, Mr. Burckart could have a conflict of interest on two grounds. One, if Mr. Burckart has received income aggregating \$250 or more in value during the past 12 months from a developer, that developer is a "source of income" to Mr. Burckart within the meaning of Section 87103. Then the question is whether the Board's decision on the fee schedule could have a foreseeable material financial effect on the developer distinguishable from its effect on the public generally.

The Commission has provided guidelines for determining whether a decision will have a material financial effect on a business entity^{2/} in 2 Cal. Adm. Code Section 18702(b)(1):

^{2/} Business entity is defined in the Act 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.

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...the effect of the decision will be to increase or decrease:

(A) The annualized gross revenues by the lessor of:

1. One hundred thousand dollars (\$100,000); or
2. One percent if it is one thousand dollars (\$1,000) or more; or

(B) Annual net income by the lesser of:

1. Fifty thousand dollars (\$50,000); or
2. One half of one percent if it is one thousand dollars (\$1,000) or more; or

(C) Current assets or liabilities by the lesser of:

1. One hundred thousand dollars (\$100,000); or
2. One half of one percent if it is one thousand dollars (\$1,000) or more.

Current assets are deemed to be decreased by the amount of any expenses incurred as a result of a governmental decision.

If the effect of the decision cannot be measured under these guidelines, the general test of a "material financial effect" as being a significant effect on the entity should be applied. 2 Cal. Adm. Code Section 18702(a). For example, if a developer could not proceed on a large development due to the present connection fees or could only proceed by making substantial changes to the plans, the Board's decision to change the fee structure and lower the fees for large developments would clearly have a significant effect on the developer.

These same tests should be applied to Mr. Burckart's own financial interests, i.e., his subcontracting business. If it were foreseeable that a decision on the fee schedule would have an effect on his own business, there would be a basis for possible disqualification. An effect is "foreseeable" within the meaning of Section 87103 if there is a substantial probability or likelihood that it will occur; however, certainty is not required. Opinion requested by Tom Thorner, 1 FPPC Opinions 198 (No. 75-089, December 4, 1975).

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I do not have enough facts to determine whether the Board's decision will have a material financial effect on a source of income to the official or on the official's business under the general test or under the regulation's guidelines, and whether Mr. Burckart must accordingly disqualify himself on the decision to revise the fee schedules. I trust the above discussion and guidelines will be of assistance in the determination.

The second possible basis for a conflict of interest is Mr. Burckart's interest in real property located within the county assuming the value of his interest is \$1,000 or more. Section 87103(b). Again, the question is whether the decision will have a significant effect on the property's value or income producing potential. The Commission's guidelines in this regard are found in 2 Cal. Adm. Code Section 18702(b)(2):

(2) Whether, in the case of a direct or indirect interest in real property of one thousand dollars (\$1,000) or more held by a public official, the effect of the decision will be to increase or decrease:

(A) The income producing potential of the property by the lesser of:

1. One thousand dollars (\$1,000) per month; or
2. Five percent per month if it is fifty dollars (\$50) or more per month; or

(B) The fair market value of the property by the lesser of:

1. Ten thousand dollars (\$10,000); or
2. One half of one percent if it is one thousand dollars (\$1,000) or more.

I do not have enough facts as to Mr. Burckart's real property holdings to determine whether the decision's effect on them will be material. Whether the land was suitable for development either by Mr. Burckart or others would be relevant to the final determination.

During our meeting you raised the issue of whether the effects of this decision on Mr. Burckart's financial interests, even if material, would be indistinguishable from its effects on the public generally, and thus, disqualification would

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not be required. It is true that an official need not disqualify himself from a decision which will affect the public, or a significant segment thereof, in the same manner as it affects the official's financial interests. Section 87103; 2 Cal. Adm. Code Section 18703. However, large developers, who stand to be affected most by the decision to revise the fee schedule, are not a significant segment of the public based both on their small number and on the homogeneity of their interests. See Opinion requested by John Ferraro, 4 FPPC Opinions 62 (No. 78-009, November 7, 1978).

Please call me at (916) 322-5901 if you would like to discuss this letter or if you have further questions.

Very truly yours,



Diane Maura Fishburn
Counsel
Legal Division

DMF:kp

*Mrs. Jeshun -
If you need to know & include this,
I would appreciate any comments.*

D. F. G.

8/10/81

DANIEL F. GALLERY
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926 JAY BUILDING
SACRAMENTO, CALIFORNIA 95814
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*Rec'd
3/12/81*

Mr. Neil Burckart
22155 Shamrock Lane
Sonora, CA 95370

Director, Tuolumne County Water District No. 2

Dear Mr. Burckart:

This is in reply to your inquiry as to whether there would be any possible conflict of interest in your participation in Board consideration of or action upon possible revisions to the current schedule of District sewer connection fees, which are presently

"\$1,000 per residential connection, and for all other connections, \$1,000 per single family equivalent connection,"

by reason of your being a General Contractor within Tuolumne County, engaged in residential and commercial construction activities which occasionally involve you with developers, and also by reason of your owning land in the county and being interested in prospective developments of yours as a participant/owner. The possible consideration or action could result from the General Manager's concern that the present rate formula can be punitively expensive for larger developments, he having recently reported to the Board that the proposed Gardella commercial development east of Sonora (in which you are not involved) would have to pay a sewer connection fee of \$445,000, which would make the entire project unfeasible, and he is recommending consideration of downscoping the connection charges for larger developments by some formula which provides a more equitable charge.

Section 87103 of the Government Code provides that an official has a financial interest in a decision which requires his non-participation if

"it is reasonably foreseeable that the decision will have a material financial effect, distinctly distinguishable from its effect on the public generally",

on any business interests, real property or sources of income above a prescribed amount of value. The Regulations of the Fair Political Practices Commission say the prohibition applies unless the decision will affect the official's interest in

"substantially the same manner as it will affect all members of the public or a significant segment of the public." (Sec 18703)

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It would appear to me that any change in the connection fee formula or rate structure, which we may assume would essentially be of financial benefit primarily to larger developers or developments, would affect all of such developers and developments alike, and that they comprise a significant segment of the public. Accordingly, I would conclude that you are not disqualified to participate in any such consideration or Board action thereon.

Very truly yours,

Daniel F. Gallery

DFG:gr