

State of California



Fair Political Practices Commission

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July 12, 1984

James G. Rourke
City Attorney
City of Tustin
300 Centennial
Tustin, CA 92680

Re: Your Request for Advice
Our File No. A-84-141

Dear Mr. Rourke:

Thank you for your letter requesting advice from this office concerning the filing obligations of the members of the Board of Directors of the Tustin Water Corporation under the Political Reform Act.^{1/} I also received a letter from Len Miller, a member of the Board concerning the same matter. The following advice should be responsive to both letters.

ISSUE

Are the members of the Board of Directors of the Tustin Water Corporation subject to the financial disclosure and disqualification provisions of the Political Reform Act?

CONCLUSION

Yes, to the extent that the Board can make decisions which can affect private financial interests within the meaning of the Act and Commission regulations.

^{1/} Government Code Sections 81000-91014. All statutory references are to the Government Code unless otherwise noted.

DISCUSSION

The Tustin Water Corporation ("Corporation") is a nonprofit, public benefit corporation. It was formed in 1980 by the City of Tustin ("City") to act on the City's behalf in the issuance of tax-exempt bonds to finance the purchase of all of the stock of a private corporation (the Tustin Water Works) and to lease the water system to the City. Under its Articles of Incorporation, the Corporation has the following general purposes and powers:

- (a) To incur indebtedness and in connection therewith to issue bonds, debentures, notes and other evidences of indebtedness;
- (b) To purchase or otherwise acquire by lease, or by any means lawfully available, any real property owned by a person, firm or entity, including any municipal or public corporation, which property may be available for such public purposes, to construct or provide for the construction of said water facilities, and to lease all such real property as improved to the City;
- (c) To assign, transfer, mortgage, convey in trust, pledge and hypothecate the leasehold estate created by any such lease and the rentals payable to this corporation under any such lease back as security for any such bonds, debentures, notes or other evidences of indebtedness;
- (d) To construct said water facilities or to contract with others for the construction of all or portions thereof; and
- (e) To exercise any and all rights and powers which a corporation organized under the Nonprofit Public Benefit Corporation Law of the State of California may now or hereafter exercise.

My understanding is that since the corporation was formed, it has issued and sold revenue bonds, acquired the water system belonging to Tustin Water Works, and leased that system to the City. The City is presently running the water system, and the Board of the Corporation transacts very little business in its annual meetings. In the future, new bond issues may be needed to finance improvements, repairs or additions to the water

system, and the Board of the Corporation would be responsible for these activities.

In September 1983 the City Council approved amendments to the City's Conflict of Interest Code which designated the members of the Board of Directors of the Corporation as public officials and assigned them financial disclosure obligations. Two members of the Board, Len Miller and William A. Moses, have objected to the imposition of the disclosure requirements on the grounds that (1) the Board no longer exercises any of its authority or powers since the system was leased to the City and (2) the requirements should not apply to them in any event since they were already on the Board when the conflict of interest code was amended.^{2/}

Each local and state government agency is required to adopt a conflict of interest code which specifically enumerates the positions in the agency which involve the making or participation in the making of decisions which may foreseeably have a material financial effect on any financial interest, and which lists, for each such enumerated position, the specific types of investments, interests in real property and sources of income that must be reported. Sections 87300-87313. Financial interests which could foreseeably be affected by any decision made or participated in by a public official or employee must be made reportable by the agency's conflict of interest code. All codes must be reviewed and approved by the appropriate code reviewing body. In the case of a city agency, the city council is the code reviewing body. Section 82011(c). A code reviewing body must not approve a code (or amendments to a code) if it fails to provide reasonable assurance that all foreseeable potential conflict of interest situations will be disclosed or prevented. Section 87309.

As you know, the Commission has determined that a nonprofit corporation is a "local government agency" and its members are "public officials" within the meaning of the Act if the following four criteria are met:

- (1) The impetus for the formation of the corporation originated with a government agency;

^{2/} In his letter dated May 21, 1984, Mr. Miller stated that he and Mr. Moses intend to resign from the Board of the Corporation and do not wish to file any financial disclosure statements.

(2) The Corporation is substantially funded, or its primary source of funds, a government agency;

(3) One of the principal purposes of the corporation is to provide services or undertake obligations which public agencies are legally authorized to perform and which, in fact they have traditionally performed; and

(4) The corporation is treated as a public entity by other statutory provisions.

See Siegel Opinion, 4 FPFC Opinions
13 (No. 76-054, July 6, 1977).

The Corporation clearly satisfies all of the criteria,; it is therefore a "local government agency" and its members are "public officials" within the meaning of the Act. Accordingly, the members of the Board of Directors must be designated in a conflict of interest code if they can make or participate in decisions which could materially affect private financial interests. Since the city council is the code reviewing body, it must make this determination. The factors which should influence this determination include the extent of the Board's authority (both legal and actual), including the amount of the budget or other monies over which the Board has control.

What is not relevant is the manner in which the Board exercises its authority.^{3/} As we discussed on the telephone, even if the Board totally relies on staff in its decisionmaking, the authority to act is the Board's alone. However, it is important, in determining their disclosure obligations, that the principal purposes for which the Corporation was formed have been completed. It appears that the Corporation, although it has the power to act and probably will undertake significant actions in the future, is not presently engaged in any significant activities. As the Commission noted in the Siegel opinion, supra, with reference to a nonprofit corporation extremely similar to the Tustin Corporation:

^{3/} I have enclosed a copy of Commission regulation, 2 Cal. Adm. Code Section 18700, which defines when a board has decisionmaking authority. Clearly the Board satisfies the regulatory criteria so the sole issue is whether the types of decisions they make can affect private financial interests.

At the time this opinion was requested, the Corporation had not yet issued any bonds. Since that time, however, all the bonds have been issued and sold. This fact does not alter our conclusion that the members of the Corporation are public officials, but it may have a bearing on whether the Corporation must now adopt a conflict of interest code and, if so, what disclosure the code might require. If, for example, the only functions which the Corporation still performs are purely ministerial, a code may no longer be required. See Section 87302 and 2 Cal. Adm. Code Section 18751. Even if a code is required, the disclosure responsibilities imposed on the Corporation's directors would be limited and specific in light of the limited role the Corporation now plays in operating the water system project. See Section 87302.

4 FPPC Opinions 13 footnote 4.

It is up to the City Council to determine whether the Corporation's activities at this point are purely ministerial or not.^{4/} One option would be for the City Council to remove the members of the Board of Directors from the code until such time as the Corporation is reactivated for the purpose of issuing bonds and repairing or improving the water system. On the other hand, if the Corporation can initiate significant actions at any time, it would be appropriate to keep the Board members in the code. If this course is taken, the City Council might wish to review the present extent of the required disclosure and consider narrowing it.

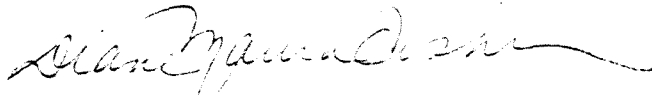
Messrs. Miller and Moses' objection to the code based on its "retroactive" application to them is not a ground for exempting them from the disclosure requirements. A code becomes effective when approved by the code reviewing body, and initial statements are due 30 days later disclosing interests held on the effective date of the code. While disclosure cannot be required for interests held prior to the effective date of the code, it can be required for officials who are in designated positions on that date. Sections 87302 and 87303.

^{4/} Ministerial acts are those acts required by law or other governing regulation. For example, if the Board were required to conduct an audit each year under the Articles of Incorporation, a decision to conduct an audit would be ministerial.

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I trust you have found this discussion helpful. If you would like to discuss this matter further, please feel free to contact me at (916) 322-5901.

Sincerely,



Diane Maura Fishburn
Counsel
Legal Division

DMF:plh
cc: Len Miller
William A. Moses