

# California Fair Political Practices Commission

January 24, 1989

Don H. Vickers  
Deputy County Counsel  
Office of the County Counsel  
Santa Barbara County  
105 East Anapamu Street  
Santa Barbara, CA 93101

Re: Your Request for  
Informal Assistance  
Our File No. I-88-470

Dear Mr. Vickers:

You have requested advice concerning whether the Political Reform Act<sup>1/</sup> prohibits Supervisor Tom Rogers from participating in decisions concerning a firm at which his spouse is employed.

Since your request does not concern advice about a specific pending decision, we are treating it as one for informal assistance under Regulation 18329(c) (copy enclosed).<sup>2/</sup>

Specifically, you have asked us to review a letter you have written to Supervisor Rogers, who is a member of the Santa Barbara County Board of Supervisors. Supervisor Rogers' spouse is an employee of a landscape architectural firm that may in the future contract directly with the county or sub-contract with other firms on county contracts. Your letter analyzes the applicability of Section 1090 and the Political Reform Act to several hypothetical situations involving the architectural firm that could pose a conflict of interest to Supervisor Rogers.

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1/ Government Code Sections 81000-91015. All statutory references are to the Government Code unless otherwise indicated. Commission regulations appear at 2 California Code of Regulations Section 18000, et seq. All references to regulations are to Title 2, Division 6 of the California Code of Regulations.

2/ Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Government Code Section 83114; 2 Cal. Code of Regs. Section 18329(c) (3).)

Having reviewed your letter, we find it to be accurate in its analysis of the general applicability of the Political Reform Act. However, your application of the Commission's "materiality" regulations (Regulations 18702 through 18702.6, copies enclosed) is incorrect. Since your letter attempts to inform Supervisor Rogers of the parameters of his participation in government decisions concerning his spouse's firm, we feel it is important to explain the applicability of these regulations.

In your letter you correctly state that Section 87100 prohibits officials from participating in government decisions in which they have a "financial interest." You also accurately apply Section 87103 in determining whether Supervisor Rogers has a financial interest in decisions which concern his spouse's firm. As you conclude, Supervisor Rogers has an economic interest in the firm because it has been a "source of income" to him through his spouse under subdivision (c) of Section 87103, and under Sections 82029 and 82030.

However, your next step in the analysis, attempting to determine whether Supervisor Rogers' financial interest is "material," is incorrect. On page three of your letter, you state, in essence, that Regulation 18702.1(a)(4) will apply to the materiality question because the decision could foreseeably increase or decrease the income of his spouse by at least \$250. Further, you state that Regulation 18702.2 applies to determine whether the decision is material as to the firm itself.

Regulation 18702 sets forth the guidelines for determining whether an official's financial interest in a decision is "material" as required by Section 87103. If the official's financial interest is directly involved in the decision, then Regulation 18702.1 applies to determine materiality. If the financial interest is indirectly involved, then Regulations 18702.2 through 18702.6 apply. In applying these regulations to the hypothetical situations described in your letter, it is important to remember that the economic interest at the focus of the analysis is not Supervisor Rogers' spouse, but her "source of income," the landscape architectural firm.

Keeping that in mind, it is apparent that Regulation 18702.1 will apply in situations before the board of supervisors that directly affect the firm. In these situations, subdivision (a)(1) would prohibit Supervisor Rogers from participating in the decision if the firm has been a source of income to him of at least \$250 in the preceding 12 months. On the other hand, subdivision (a)(4) does not apply because neither Supervisor Rogers nor his spouse will be directly affected by the decision.

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Where the firm is not directly involved in the decision, such as when it is a potential sub-contractor on a contracting decision before the board, Regulations 18702.2 through 18702.6 apply. Since the firm is a business entity, Regulation 18702.2 is directly applicable and a determination must then be made as to whether, under the regulation's requirements, the decision materially affects the firm. Your letter accurately analyzes and explains the applicable portions of this regulation but seems to apply it to situations in which the firm is both directly and indirectly involved in the decision. As explained, Regulations 18702.2 through 18702.6 apply only when the economic interest of the official is indirectly involved.

Finally, please note that the Commission does not have jurisdiction over Section 1090. Consequently, we cannot advise you as to its applicability to Supervisor Rogers. Please contact the Attorney General if you have questions regarding this section.

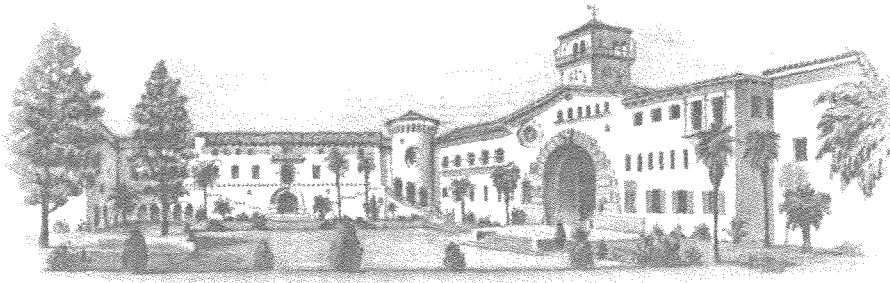
I hope that this response has been helpful. However, should you have further questions please contact me at (916) 322-5901.

Sincerely,

Diane M. Griffiths  
General Counsel

  
By: Scott Hallabrin  
Counsel, Legal Division

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FPPC

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MARVIN LEVINE  
Acting County Counsel

**COUNTY COUNSEL**  
SANTA BARBARA COUNTY

105 East Anapamu Street  
Santa Barbara, CA 93101  
Telephone: (805) 568-2950

December 12, 1988

Fair Political Practices Commission  
428 J Street, Suite 800  
Sacramento, California 95814

Attention: Legal Division

Gentlemen:

This office has prepared the enclosed letter to Supervisor Tom Rogers in response to questions he has raised concerning possible limitations on his participation in matters which may have a financial impact upon his wife or her employer. I have reviewed the matter with him and we are in agreement to request your office to review the contents of our letter and to solicit any comments you may have regarding the handling of potential conflicts.

I am sure you can appreciate that many projects come before the Board of Supervisors in which the services of a landscape architect may be needed in order to develop the material presented to the Board of Supervisors or to develop the project if Board approval is obtained. The employer in question is one of the leading landscape architectural firms in the Santa Barbara area.

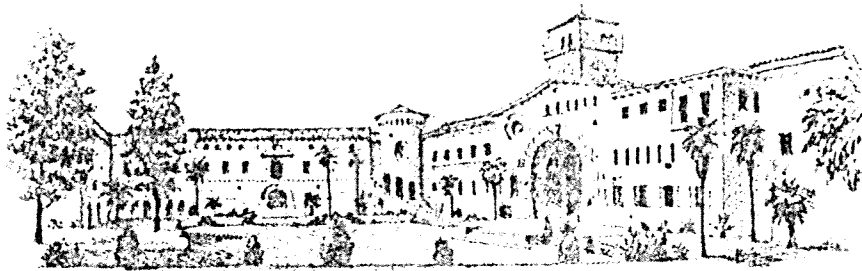
Please contact the undersigned if further information would be helpful to you. Your advice will be greatly appreciated.

Very truly yours,

MARVIN LEVINE  
ACTING COUNTY COUNSEL

By   
DON H. VICKERS  
DEPUTY COUNTY COUNSEL

cc: Supervisor Tom Rogers  
7486B



KENNETH L. NELSON  
County Counsel

MARVIN LEVINE  
Chief Assistant

COUNTY COUNSEL  
SANTA BARBARA COUNTY

105 East Anapamu Street  
Santa Barbara, CA 93101

Telephone: (805) 568-2950

November 3, 1988

Supervisor Tom Rogers  
County of Santa Barbara  
105 E. Anapamu  
Santa Barbara, CA 93101

Dear Supervisor Rogers:

You have asked us to review a series of situations which could arise involving the county and the private landscape architectural firm of Grant Castleberg and Associates. You have recently married an employee of that firm. Your wife is a landscape architect. She has no ownership interest in the firm. She works for the firm in the roles of project manager and project designer.

Before addressing the particular situations posed by you we will review in some detail the two statutory conflict of interest provisions which may apply to the situations posed by you.

Section 1090 of the Government Code provides that county officers shall not be financially interested in any contract made by them in their official capacity or made by any body or board of which they are members. Section 1090 relates only to contractual arrangements as opposed to the broader scope of the provisions of the Political Reform Act discussed later. However in cases where Section 1090 does apply, it applies very strictly. Unlike the Political Reform Act, Section 1090 does not set forth thresholds for determining whether or not a financial impact interest is material. Furthermore a contract is prohibited even in cases where a board member disqualifies himself from voting on the contract.

It has been held that an employee of a firm contracting with a public entity has a financial interest in that contract. In Stockton Plumbing and Supply Company v. Wheeler 68 Cal.App. 592,

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the court invalidated a contract between a city and contractor where a city councilman was employed by the contractor as a sheet metal foreman. The court concluded that the indirect interest of the councilman with the contractor's success financially was sufficient to be considered a conflict given the obvious fact that the continued tenure of his employment depended upon the success of the contractor.

In Nielsen v. Richards 75 Cal.App. 680, it was held that an officer was financially interested in his wife's earnings even where they had agreed that such earnings would be her separate property.

We conclude from these authorities that the provisions of Section 1090 will apply to contracts which the board enters into with the landscape architectural firm given your wife's employment with that firm and your interest in her earnings. The legislature has enumerated certain exceptions to interests that would otherwise fall within the strict rules of Section 1090. However, none of those exceptions appear to apply to this situation.

The other provisions which require analysis are found in the Fair Political Practice Act and regulations adopted by the Fair Political Practice Commission.

Section 87100 of the Government Code provides that no public official shall make, participate in making, or in any way use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest.

Section 87103 of the Government Code gives more specific meaning to the general language of Section 87100 by providing that an officer has a financial interest in a decision within the meaning of Section 87100 if it is reasonably foreseeable that the decision will have material financial effect, distinguishable with its effect on the public generally, on the officer, on a member of the officer's immediate family, or on any source of income aggregating \$250 or more in value to, received by, or promised to the public official within 12 months prior to the time when the decision is made.

Section 82030 of the Government Code defines income to include any community property interest in the income of a spouse.

Section 82029 of the Government Code defines immediate family to include a spouse and dependent children.

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These statutory provisions indicate that you must not participate in a decision which may have a material financial effect on your wife or on the firm since that firm obviously is deemed to be a source of income to your wife.

Regulations adopted by the Fair Political Practice Commission address the issue as to what constitutes a material financial effect.

Section 18702.1 of Title 2 of the California Administrative Code provides that a public official shall not make, participate in making, or use his or her official position to influence a governmental decision if it is reasonably foreseeable that the personal expenses, income, assets or liability of the officer or his or her immediate family will be increased or decreased by at least \$250 by the decision.

Section 18702.2 of Title 2 sets forth measures by which to determine whether the reasonably foreseeable effect of a governmental decision will be material as to a business entity in which an officer has an economic interest. An officer has an economic interest in an entity which is a source of income of at least \$250 within the preceding 12 months. Obviously you have an economic interest in the firm. The measures of materiality set forth in Section 18702.2 vary depending on the size of the business entity. We assume that Grant Castleberg and Associates does not have tangible assets of at least \$4,000,000 and a pre tax income for the last fiscal year of at least \$750,000 and a net income for that period of at least \$400,000. If our assumption is correct that the firm does not meet those financial standards, a decision will be deemed material to that firm if (1) the decision will result in an increase or decrease in the gross revenues by \$10,000 or more for a fiscal year or (2) the decision will result in the business entity incurring or avoiding additional expenses or eliminating existing expenses for a fiscal year in an amount of \$2500 or more or (3) the decision will result in an increase or decrease in the assets or the liability of the firm of \$10,000 or more in a fiscal year.

In summary in cases where Section 1090 of the Government Code does not apply, you may not participate in county decisions where it is reasonably foreseeable that the decision will affect your or your wife's income by \$250 or more or where the decision will affect the gross revenues of her employer by \$10,000 or more in a fiscal year or will affect the expenses of that firm by \$2500 or more in any fiscal year.

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Now we will address the situations posed in your letter:

1. The firm is awarded a contract directly (firm specified in contract) by vote of the Board of Supervisors.

The action by the Board of Supervisors is prohibited by Section 1090 of the Government Code.

2. The firm is contracted to a general contractor that is awarded a contract directly by vote of the Board of Supervisors.

The following language from People v. Deysher Cal.2d 141, 146 is on point:

"The purchase, after award of contract and without previous agreement so to do, by the contractor of material, used in the performance of the contract, from a member of the board awarding the contract, or from a corporation of which such member is a stockholder or employee, does not create, in such member, an interest in the contract, which will invalidate it. (Escondido Lumber etc. Co. v. Baldwin, 2 Cal.App. 606 [84 Pac. 1158]). However, if the purchase is made pursuant to an agreement, made before the award of contract, the latter is void.

The foregoing language indicates that the provisions of Section 1090 would apply to situation No. 2 since the firm's contract with the general contractor predated the County's award.

3. The firm is retained by a general contractor through some hiring process after that contractor has been awarded a contract by vote of the Board of Supervisors.

The foregoing language from the Deysher case indicates that this arrangement would not be prohibited when no contract existed prior to the contract with the county. However, facts could exist in a particular circumstance making it apparent at the time of the award by the county that a contract would be entered into between the contractor and the firm. In those circumstances the transaction would be prohibited. Likewise, if the Board of Supervisor's approval of the employment of the firm by the contractor is required, then Section 1090 would, in our opinion, apply.

4. A county department or agency contracts with the firm for some project on its own without Board vote.

The county purchasing agent is authorized to engage independent contractors for the county at a cost not to exceed \$25,000 (Section 25502.5 Government Code; Section 2.42 County Code). When a purchasing agent acts under this authority, the Board of Supervisors does not make the contract and thus the prohibition of Section 1090 does not apply (57 Ops.Atty.Gen. 458). Of course no Board member interested in the contract should in any way attempt to exert any influence on the purchasing agent because the restrictions of 1090 apply to the entire process of developing a contractual relationship and are not limited to the formality of awarding a contract (People v. Sobel 40 Cal.App.3d 1046).

5. As a result of some Board action, though not specified as part of the action, the firm is contracted to perform services for the County.

This situation is a variation of the fourth situation posed by you and would appear to involve the same considerations. If the action of the Board is likely to result in the hiring of the firm, the provisions of Section 1090 will apply. The transaction should be viewed in light of the specific facts surrounding it.

6. What regulations pertain to Board actions on private projects which have already retained the firm for services before the project comes to the Board?

The foregoing discussion of the Fair Political Practice Act and implementing regulations have already answered this question. The Board is not precluded from acting on such a project but you may not participate in the Board's actions if the financial impact of the Board's decision will affect you or your wife by at least \$250 or in any fiscal year will affect the firm's gross income by \$10,000 or the expenses of the firm by \$2500.

7. What regulations pertain to review of private projects that have come to the Board for action and which, at a later date, retain the firm for its services?

This inquiry focuses on the "reasonably foreseeable" language of Section 87103 of the Government Code. In other words when is it

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reasonably foreseeable that a decision on a project will have a material effect on the firm. The best authority on point is a formal opinion by the Fair Political Practice Commission known as the Thorner Opinion (1 FPPC 198). That opinion quotes with approval the following language from the Dixon Yates case, U.S. v. Mississippi Valley Generating Company 364 U.S. 520, 560.

"We do not think that the absence of such a formal agreement or understanding is determinative. The question is not whether Wenzell was certain to benefit from the contract, but whether the likelihood that he might benefit was so great that he would be subject to those temptations that the statute seeks to avoid."

The FPPC opinion analyzed four possible situations which might involve a store that sold building materials. A Water Board director was financially interested in the store. Those situations at the time the Water Board made a decision on a project were (1) the store had no connection with the project but may later supply materials to it (2) the store was preparing or had made a bid to supply materials to the project but the contractor or developer of the project had not yet made the award for supplies (3) the contractor, who is a regular customer of the store and normally buys its supplies from the store, is prepared to bid on the project but no contract for the project has yet been awarded and (4) the facts are the same as in 3 except that the contractor in question has been awarded the contract on the project.

The FPPC resolved the four situations addressed to it as follows, reasoning that the issue was not one of certainty of financial benefit to the store but rather one of reasonable foreseeability. In the first case it was not reasonably foreseeable that the store would supply the project given the fact that there was a competitive market in the area. In the second example the commission concluded that it was reasonably foreseeable that the store would benefit from the project since the store presumably bid with a "serious hope" that it would receive the award. In the third example the FPPC found the likelihood of financial benefit too remote since the store's regular customer might well not get the work. In the fourth example the commission found that a conflict would exist since the store would likely supply the project based on its past association with the successful contractor.

We hope that the foregoing will provide sufficient assistance to you. As you can see an individual analysis is required in each

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case to determine the likelihood that the firm will work on a project. If there is that likelihood, then the next issue is whether the financial effect is likely to be material using the standards found in Title 2 discussed above.

8. What is the time period of concern relating to Board actions and private projects and what is the standard of transaction, e.g. billed services versus receipt of actual compensation due?

Section 1090 does not have a time period since there is no fixed dollar standard to be used. In contrast the standard set forth in Section 18702.2 of Title 2 is that the effect of a decision will be considered to be material on the firm if it will result in an increase or decrease in gross revenues in a fiscal year by \$10,000 or more or if expenses will be increased or decreased by \$25,000 or more in a fiscal year. The issue raised by you may technically involve how the firm accounts for its revenues and expenses. However, if the amounts involved are so close to \$10,000 or \$2500 that reaching those figures depends on the promptness of payment after billing, the disqualification provisions should probably be invoked. The issue is what the impact is reasonably expected to be at the time the decision is made rather than the final impact after the project is completed.

Very truly yours,

KENNETH L. NELSON  
COUNTY COUNSEL

By  
DON H. VICKERS  
DEPUTY COUNTY COUNSEL

7225B



# California Fair Political Practices Commission

December 21, 1988

Don H. Vickers  
Deputy County Counsel  
County of Santa Barbara  
105 East Anapamu Street  
Santa Barbara, CA 93101

Re: 88-470

Dear Mr. Vickers:

Your letter requesting advice under the Political Reform Act was received on December 16, 1988 by the Fair Political Practices Commission. If you have any questions about your advice request, you may contact Scott Hallabrin, an attorney in the Legal Division, directly at (916) 322-5901.

We try to answer all advice requests promptly. Therefore, unless your request poses particularly complex legal questions, or more information is needed, you should expect a response within 21 working days if your request seeks formal written advice. If more information is needed, the person assigned to prepare a response to your request will contact you shortly to advise you as to information needed. If your request is for informal assistance, we will answer it as quickly as we can. (See Commission Regulation 18329 (2 Cal. Code of Regs. Sec. 18329).)

You also should be aware that your letter and our response are public records which may be disclosed to the public upon receipt of a proper request for disclosure.

Very truly yours,

*Diane M. Griffiths*  
Diane M. Griffiths (CLU)  
General Counsel

DMG:plh