



California Fair Political Practices Commission

January 23, 1989

Peter E. Tracy
Town Attorney
Town of Mammoth Lakes
Post Office Box 485
Bishop, CA 93514

Re: Your Request for Advice
Our File No. I-89-036

Dear Mr. Tracy:

We have received your letter on behalf of the Town Council of the Town of Mammoth Lakes requesting that the Commission review the actions of Neil McCarroll, the former town attorney. Your letter indicates that the town council wishes to know whether Mr. McCarroll's past conduct is consistent with the Political Reform Act.^{1/}

Your questions concern the past conduct of a third party. The Commission does not provide advice about past conduct. (Regulation 18329(c), copy enclosed.) Moreover, the Commission does not provide advice about the conduct of a third party unless the advice is requested by an authorized representative of the third party. (Regulation 18329(c).) Therefore, we cannot provide the advice you have requested.

The questions you have asked usually are handled by our Enforcement Division. In that case, your letter would be considered a complaint alleging violations of the Political Reform Act. However, your letter states that the town council does not wish to make any accusations against Mr. McCarroll. Based on this statement, we have decided not to refer your letter to the


^{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.

Peter E. Tracy
January 23, 1989
Page 2

Enforcement Division for review and possible investigation.
Please contact me at (916) 322-5901 if the town council determines
that it does want to refer this matter to the Enforcement
Division.

Sincerely,

Diane M. Griffiths
General Counsel

A handwritten signature in cursive script that reads "Kathryn E. Donovan".

By: Kathryn E. Donovan
Counsel, Legal Division

DMG:KED:plh



Peter E. Tracy, Town Attorney
Post Office Box 485, Bishop, California 93514
619-872-1101

January 10, 1989

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

Re: FPPC Review

Gentlemen:

I am writing this letter to you at the unanimous request of the Town Council of the Town of Mammoth Lakes ("Town"). The Town requests that the FPPC review the actions of Neil McCarroll ("McCarroll") for purposes of determining whether such actions are consistent with the mandate of the Fair Political Practices Act. The actions are very generally set forth below with a view that the FPPC review will develop the facts fully.

The Town wishes to make clear that it is not making any accusations against McCarroll; nor is the Town of the opinion that there has been a violation of either the principal or the spirit of the Fair Political Practices Act. Rather, the Town is of the opinion that, under existing circumstances, it is in the best interests of all concerned to have the FPPC conduct an independent review and make such findings and determinations as it deems appropriate.

From approximately August, 1984 when the Town was incorporated, until December 31, 1987, McCarroll was Town Attorney for the Town. Shortly after his departure from the Town, McCarroll was hired as Assistant County Counsel for Mono County and has been so to date.

Prior to the incorporation of the Town in August, 1984, Lodestar Company, a developer, owned (and still owns) approximately two hundred (200) acres of land in Mono County which is presently within the Town limits. Lodestar Company sued Mono County in Federal District Court. After incorporation, the Town was added as an additional Defendant. Certain of the allegations against the Town include actions allegedly taken and representations allegedly made by McCarroll as Town Attorney.

JAN 11 1989
FPPC

Page Two
January 10, 1989

Although McCarroll was not attorney of record for the Town in the Lodestar litigation, he was for a time actively involved in handling litigation related matters. In the summer of 1987 the question arose as to whether or not there may be a Fair Political Practices Act prohibition against McCarroll's involvement in the Lodestar litigation based upon his ownership interest in a parcel of land near the Lodestar property. The Town sought an opinion from the Law Firm of Best, Best & Krieger, a copy of which is enclosed and which is self-explanatory.

After McCarroll left the Town on December 31, 1987, he became Assistant County Counsel for Mono County. In the summer of 1988 he, as one of the owners of property near the Lodestar property, participated in processing a parcel map division of that property. In the fall of 1988, McCarroll contacted Town Council members respecting possible settlement of the Lodestar litigation.

A meeting was conducted between McCarroll, James Reed, Mono County Counsel, and Paul Marangella, Town Manager, in early December, 1988 respecting possible conflicts of interest. At that meeting, it was agreed that McCarroll would "stay out of the Lodestar matters".

On December 30, 1988, McCarroll met with the Town Planning Director, Brian Hawley, and his assistant, Bill Taylor, respecting development of the Rayson property, which is the property adjacent to the Lodestar property and in which McCarroll at one time held an ownership interest. Whether McCarroll had an ownership interest in the Rayson property, or other nearby property, on the date of this meeting is unknown to the Town. McCarroll did, however, discuss development of this parcel and indicated that he had an "interest" in the property and that he was "representing" the Rayson developers.

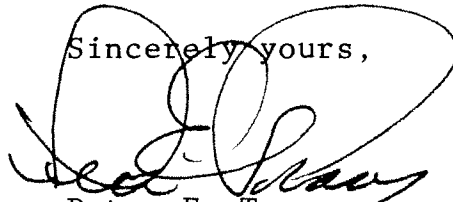
The Town wishes to have the FPPC review the foregoing matters in order to clear the air and take the high road. In this regard, the Town wishes to make clear that it is not making accusations of any kind against McCarroll. Further, it should be noted that the matters set forth above are as the Town believes them to be. After review, the FPPC may find that the true facts may prove the Town's perceptions incorrect.

Page Three
January 10, 1989

If you have any questions, please do not hesitate
to contact me at the above number, and;

I remain,

Sincerely yours,



Peter E. Tracy
Town Attorney

PET:bh

Enclosure

cc: Town of Mammoth Lakes
Town Council of Mammoth Lakes
Board of Supervisors, Mono County
James Reed, Mono County Counsel
Myron Blumberg, Esq.

MEMORANDUM

August 17, 1987

TO: TOWN ATTORNEY
FROM: SPECIAL COUNSEL
RE: CONFLICT OF INTEREST

STATEMENT OF FACTS

Best, Best & Krieger has been requested by Neil McCarroll, town attorney for the Town of Mammoth Lakes ("Mammoth"), to provide an opinion regarding a possible conflict of interest which would prevent McCarroll from assisting us in representing Mammoth on land use matters arising out of ongoing litigation and negotiations with the Lodestar Company on a proposed development project in Mammoth.

McCarroll owns a three and a half percent interest in the Meridian Village Partnership ("Partnership"). The Partnership owns 25 acres of real property (the "Forest Service 40") across the street from the 200 acres which are owned by the Lodestar Company and are currently the subject of a development agreement application as well as related litigation. Mammoth has a total of 2,000 acres within its boundaries.

The approximate fair market value of the undeveloped Forest Service 40 is \$1.5 million. The property is currently not producing income. The property surrounding the Forest Service 40 property is also generally undeveloped.

Both Lodestar and the Forest Service 40 are designated "resort" in the draft general plan. Lodestar has an approved master plan of development, while the Forest Service 40 does not.

If McCarroll does not have a legal conflict, he would be able to assist the firm in document gathering and preparation which could save time and money for Mammoth.

ISSUES PRESENTED

1. Whether it is reasonably foreseeable that a decision on the Lodestar project will have a material financial effect upon the property in which McCarroll has an interest.

2. Whether any foreseeable material financial effect upon the property in which McCarroll has an interest is distinguishable from the "public generally" or a "significant segment of the public."

ANALYSIS

1. The Political Reform Act ("the Act") prohibits "public officials" from making decisions which will affect their own financial interests. The act is found in California Government Code §§81000 et seq. All statutory references are to the Government Code unless otherwise noted.

Section 87100 provides as follows:

"No 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."

"Public official" means every member, officer, employee or consultant of the state or a local government agency. Section 82048. Therefore, McCarroll as the town attorney is a "public official" subject to Section 87100's restrictions.

A public official participates in the making of a governmental decision when, acting within the authority of his position, he "advises or makes recommendations to the decision maker, either directly or without significant intervening substantive review, by: (A) conducting research or making any investigation which requires the exercise of judgment on the part of the official or designated employee and the purpose of which is to influence the decision; or

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(B) preparing or presenting a report, analysis or opinion, orally or in writing, which requires the exercise of judgment on the part of the official or designated employee and the purpose of which is to influence the decision."

Title 2, California Administrative Code §18700(c)(2). Thus, if McCarroll were to assist Best, Best & Krieger in gathering and preparing documents related to a decision on the Lodestar development or its related litigation, he would be "participating in the making of a governmental decision" under Section 87100. Even in merely collecting documents for our review he would be exercising his judgment as to which documents were appropriate to send us, which in turn could influence our recommendation to the Town Council, which could ultimately influence their decision.

Section 87103 defines "financial interest" and provides in relevant part that:

"An official has a financial interest in a decision within the meaning of §87100 if it is reasonably foreseeable that the decision will have a material financial affect, distinguishable from its effect on the public generally, on the official . . . or on:

(a) any business entity in which the public official has a direct or indirect investment worth one thousand dollars (\$1,000.00) or more;

(b) any real property in which the public official has a direct or indirect interest worth one thousand dollars (\$1,000.00) or more;

(c) any source of income. . . [greater than \$250]. . . ;

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

For purposes of this section, indirect investment or interest means any investment or interest owned by a business entity or trust in which the official, the official's agents, spouse, and dependent children own directly, indirectly or beneficially a ten percent (10%) interest or greater."

Assuming that the equity interest in this property is substantial, McCarroll appears to have a financial interest under subdivisions (a), (b) and (d). His 3½% interest in a partnership/business entity which has as one of its assets a million and a half dollar piece of property would indicate that he has an investment worth one thousand dollars or more under subdivision (a). He also has a financial interest under subdivision (d) because he is a partner in the business entity.

It is also possible that he has a financial interest under subdivision (b) if the real property is held in his name as well as that of the other partners (3½% of \$1.5 million being greater than the \$1,000 threshold). On the other hand, if the real property is held in the name of the partnership, it is arguable that McCarroll would not have a financial interest under subdivision (b) because he did not meet the 10% rule for indirect investments held by a business entity.

However, because he appears to have a financial interest under subdivisions (a) and (d), it is unnecessary

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to pursue this question, or whether he has a financial interest under subdivision (c), any further.

Having determined that McCarroll is a "public official" who would be "participating in a governmental decision" in which he has a "financial interest," it next becomes necessary to determine whether such a decision will have a "material financial effect" on that interest. In making this determination we are assuming that allowing the Lodestar property to be developed would have the effect of substantially increasing the property values of surrounding parcels. This assumption is based on the following: (1) The development of the Lodestar property would increase the number of individuals who frequent the area; (2) the development of Lodestar would provide an opportunity for adjacent property owners to develop their property in ways which would compliment the Lodestar development and would bring necessary infrastructure closer to those adjacent properties; and (3) as a general rule when real property is improved and increases in value, surrounding real property will mirror these increases.

The difficulty with this question is determining exactly how much the Forest Service 40 unimproved property's value would increase or decrease due to the Lodestar development. This will depend on the nature and quality of the actual Lodestar development that is approved by the Town. If there is a concern that our assumption regarding Lodestar's effect on the Forest Service 40's value is

incorrect, it might be appropriate to have a real estate appraisal of the Forest Service 40 property now and an estimated appraisal based on what its value would be when the Lodestar development, as submitted, is complete.

2 California Administrative Code Section 18702.2 provides guidelines for determining when an effect on a business entity is "material" within the meaning of section 87103. In pertinent part, the regulation reads as follows:

"(a) This section shall be used to measure whether the reasonably foreseeable effect . . . will be material as to a business entity in which an official has an economic interest.

(b) [This subdivision mirrors section 87103 in defining an economic or financial interest.]

(c) [This subdivision discusses what a material effect is on a business listed on the New York or American Stock Exchange.]

(d) [This subdivision discusses what a material effect is on a business entity listed on the National Association of Security Dealers national market list.]

(e) [This subdivision discusses what is a material effect on a business entity not covered by (c) or (d) but which is qualified for public sale in this State pursuant to Corporations Code Section 25110 (which applies to partnerships and other business entities as well as corporations). This Corporations Code section requires that prior to the sale of any security (including certain partnership shares) the sale must be qualified with the Corporations Commissioner for the State of California unless it falls under a set of limited exemptions.]

(f) [This subdivision determines what is a material effect on those businesses not covered by subdivisions (c) or (d) which meet the financial standards for listing on the New York Stock Exchange, which require net tangible assets of at least \$18 million and protects income for the last fiscal year of at least \$2.5 million.]

(g) For business entities which are not covered by (c), (d), (e) or (f), the effect of a decision will be material if: (1) the decision will result in an increase or decrease in the gross revenues for a fiscal year of \$10,000 or more; (2) the decision will result in a business entity incurring or avoiding additional expenses or reducing or eliminating existing expenses for a fiscal year in the amount of \$2,500 or more; or (3) the decision will result in an increase or decrease in the value of assets or liabilities of \$10,000 or more."

According to facts given us by McCarroll, the partnership would fall under subdivision (g). Under this subdivision, the decision would have a material financial effect on the business entity if the decision to grant the development agreement increased or decreased the fair market value of the Forest Service 40 property by as little as .67% (\$10,000 increase or decrease in the value of assets divided by \$1.5 million fair market value of property). Since the value of the property involved is so large, unless development of Lodestar has essentially no effect on its value it would meet the \$10,000 threshold and thereby be considered "material." Thus, it appears that McCarroll would have a material financial interest in a Lodestar decision.

2. The final issue is whether this material financial effect would be different than that felt by the public generally. 2 California Administrative Code Section 18703 provides guidelines as to what the term "effect on the public generally" means. It states:

"A material financial affect of a governmental decision on an official's interest . . . is distinguishable from its affect on the public generally 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. Except as provided herein an industry, trade or profession does not constitute a significant segment of the general public.

(a) [Relating to state officers.]

(b) In the case of any other elected official, an industry, trade or profession of which that official is a member may constitute a significant segment of the public generally if that industry, trade or profession is a predominant industry, trade or profession in the official's jurisdiction or in the district represented by the official.

(c) [Relating to ordinances adopted by a jurisdiction designating an industry, trade or profession as constituting a significant segment of the public.]

(d) [Limiting the ability to claim that an industry, trade or profession is a predominant industry in nonsubdivision (c) situations to those situations where such a finding is implicit 'taking into account the language of the statute, ordinance or other provision of law creating or authorizing the creation of the state agency, the nature and purposes of the program. . . .']"

The Fair Political Practices Commission ("FPPC") interprets and enforces the Act. In reviewing the FPPC opinions that have dealt with the issue of a "significant segment of the public" or "the public generally" it appears that the line of reasoning used by the Commission would lead to the conclusion here that the effect on McCarroll's property was different than the effect on the public generally or on a significant segment of the public. In the Matter of Opinion Requested by William L. Owen, 2 FPPC Opinions 77 (No. 76-005, June 2, 1976), the City of Davis designated a 23 square block area as being subject to review for a new land use plan. This new area plan could have had significant financial effects on real property within and near the area. The Commission held that both residential homeowners and retail merchants doing business within the city constitute a significant segment of the public. However, they also held that the class of commercial lessors near the area was not a significant segment of the public because its members would be directly and particularly affected by a specific decision.

In reviewing this and other relevant FPPC opinions, it is clear that the FPPC defines the "public generally" to include all constituents within the official's jurisdiction. In the Matter of Opinion Requested by Thomas L. Legan, 9 FPPC Opinions 1 (No. 85-001, August 20, 1985) at page 12. In the Legan opinion, the FPPC held that where

only 742 parcels would be affected by a rezoning in a jurisdiction with over 100,000 parcels, the effect on a business entity owning one of the 742 parcels was clearly "distinguishable from the effect upon the public generally." Id. at 13.

In its Ferraro opinion (No. 78-0094 FPFC Opinion 62, November 7, 1978), the FPFC stated: "In order to be considered a significant segment of the public, we think a group usually must be large in numbers and heterogeneous in quality." Id. at 67. As an example of an application of that standard, the Commission, in the Legan opinion, held that even if the 742 parcels were held by individual owners, this was not a significant segment of the public where there were approximately 383,000 property owners in the county.

We are assuming that there are few owners of resort-zoned property that would be materially affected in a manner similar to the partnership when compared with the total number of property owners in Mammoth. If that is the case, it seems under the reasoning used by the FPFC that the effect on the partnership property would not be the same as the effect on the public generally or a significant segment of the public. This is based on the fact that the general plan for Mammoth indicates that there are approximately 5,000 permanent residents in the town and over 1,500 permanent residential units (including single family residences and condominiums only). The conclusion is also

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based on the fact that there is a total of only 503 acres zoned resort within Mammoth. When you subtract the 200 acres attributable to Lodestar, this leaves only 303 acres of resort property within Mammoth. Assuming that most of this property is held in parcels similar to that of the partnership (i.e. 25 acre parcels), this would mean that there are approximately 12 other owners of resort-zoned parcels within the Town boundaries. This number would be reduced to exclude those owners of resort-zoned parcels that are not near the Lodestar property and may not be materially financially affected by the development. This leads to the conclusion that in all likelihood less than 10 other resort parcel owners would be affected in the same way as the partnership property. Based on the relevant statutes, regulations and decisions, this small a number would not in our opinion constitute a "significant segment of the public."

CONCLUSION

Due to what appears to us to be a legally prohibited conflict of interest, McCarroll should not assist Best, Best & Krieger in any matter related to the Lodestar project. This includes negotiating, advising, making recommendations, preparing reports or conducting research without "significant intervening substantive review." Title 2 California

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Administrative Code Section 18700(c). If he were to do so, he would be participating in the making of governmental decisions in violation of §87101. McCarroll's participation in the matter, if any, must under the same regulation be limited to acts which are "solely ministerial, secretarial, manual or clerical . . ." in nature.

DALLAS HOLMES
BRADLEY E. NEUFELD