



California Fair Political Practices Commission

March 16, 1990

Douglas S. Wilson
Director
Padre Dam Municipal Water District
10887 Woodside Avenue
P.O. Box 719003
Santee, CA 92072-9003

Re: Your Request for Advice
Our File No. A-90-141
and File No. A-90-176

Dear Mr. Wilson:

This is in response to your letter requesting advice regarding your responsibilities as a member of the board of directors for the Padre Dam Municipal Water District under the conflict-of-interest provisions of the Political Reform Act (the "Act").^{1/} Since both your advice requests deal with substantially similar issues, we have consolidated them into this single response.

QUESTIONS

1. May you participate in the Padre Dam Municipal Water District's consideration of an extension of the Santee Redevelopment Agency/Padre Dam Municipal Water District Sewer Capacity Agreement?
2. May you participate in the Padre Dam Municipal Water District's consideration of San Diego's proposal to lease and expand a reclamation plant in the district?

CONCLUSIONS

1. You may participate in the Padre Dam Municipal Water District's consideration of an extension of the Santee Redevelopment Agency/Padre Dam Municipal Water District Sewer Capacity Agreement. Because Newland California is not eligible at this time to purchase additional sewer hookups, any indirect financial effects on Newland caused by the decision to extend or not to

^{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.

extend the agreement with Santee are speculative at this time and are, therefore, not reasonably foreseeable.

2. You may not participate in the Padre Dam Municipal Water District's consideration of San Diego's proposal to lease and expand a reclamation plant in the district if the decisions will have a material financial effect on your employer, as determined by Regulation 18702.2.

FACTS

You are a member of the board of directors for the Padre Dam Municipal Water District (the "district"). Your duties as a director include the consideration of proposals to increase the sewer capacity for the district and the consideration of requests to purchase sewer capacity from the district. Currently, the district maintains sufficient sewer capacity to satisfy the needs of all areas of the district. However, as the district is further developed, there is a concern that in future the existing capacity may not be sufficient.

In addition to your position as a director of the district you are also employed by Newland California ("Newland"), a developer that has a current project in the district. Newland is developing 2,500 acres in the district into a 3,000 unit residential development. Newland has already purchased the necessary sewer capacity for the first phase of the project, however, Newland will need additional capacity in the future to complete the entire project. Newland owns no other land in the district.

The district will soon be considering the following proposals:

1. Extension of the Santee Redevelopment Agency/Padre Dam Municipal Water District Sewer Capacity Agreement.

The district will be reconsidering an agreement made with the City of Santee in 1987 by which the city repurchased 415 sewer hookups. The city has used 81 of the sewer hookups and wishes to retain the unused 334 hookups for future projects in the city. If the agreement is not extended the district will reclaim the unused hookups and the hookups may be redistributed.

In our telephone conversation of February 22, 1990 you informed me that the sewer hookups are currently distributed on a first-come, first-serve basis and that the purchase of the hookups is only permitted for projects that have been approved by the city of Santee. Further, you stated on March 6, 1990 that the Newland project has not yet received approval from the city of Santee and would therefore, not be eligible to purchase additional hookups.^{2/}

^{2/} The hookups that Newland currently maintains were purchased prior to the imposition of the requirement that projects be approved before purchasing sewer hookups.

2. The San Diego Reclamation Plant Expansion Plan.

San Diego has proposed to lease the district's water reclamation facility so that the city can expand the plant's capacity. The proposed site for the expansion is immediately adjacent to the Newland development.

ANALYSIS

Section 87100 prohibits any public official from making, participating in making, or otherwise using his official position to influence a governmental decision in which the official has a financial interest. As a member of the board of directors of the district, you are a public official under the Act. (Section 82048; Allen Advice Letter, No. A-89-708, copy enclosed.)

Section 87103 specifies that an official has a financial interest in a governmental decision if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from the effect on the public generally, on the official or a member of his or her immediate family or on:

(c) Any source of income 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.

Section 87103(c) and (d).

You stated in our telephone conversation of February 22, 1990 that you are currently employed with Newland California, and consequently, Newland is a source of income to you of over \$250 in the last 12 months. In addition, you hold the position of vice president at Newland California. Thus, you are required to disqualify yourself from district decisions where it is reasonably foreseeable that the decision will have a material financial effect on Newland, distinguishable from the effect on the public generally.

Whether the financial consequences of a decision are reasonably foreseeable at the time a governmental decision is made depends on the facts of each particular case. An effect is considered reasonably foreseeable if there is a substantial likelihood that it will occur. Certainty is not required. However, if an effect is only a mere possibility, it is not

reasonably foreseeable. (In re Thorner (1975) 1 FPPC Ops. 198, copy enclosed.)

A decision to make available additional sewer hookups might have a foreseeable financial effect on Newland if Newland had a pending application for additional hookups. However, sewer hookups are currently distributed on a first-come, first-serve basis and the purchase of the hookups is only permitted for projects that have been approved by the city of Santee. Newland has not yet received approval from the city of Santee for its proposed development and would therefore, not be eligible to purchase additional hookups even if the hookups were made available. Consequently, we conclude that any financial effects on Newland caused by the decision to extend or not to extend the agreement with Santee are speculative at this time and are therefore, not reasonably foreseeable.

However, the San Diego plan to expand the reclamation plant immediately adjacent to the property that Newland intends to develop could have a reasonably foreseeable effect on Newland. A larger reclamation plant in such close proximity to Newland's property could foreseeably decrease the fair market value of the lots in the development. Consequently, the decision concerning the lease of the reclamation plant to San Diego for expansion will have a foreseeable financial effect on Newland.

In addition to being foreseeable, an effect on an official's financial interest must also be material to result in disqualification. The Commission has adopted regulations which provide guidelines to determine whether the effect of a governmental decision is material. Where a business entity in which the official has a financial interest is directly involved in a decision before the official's agency, the official may not participate. (Regulation 18702.1(a), copy enclosed.)^{3/} However, Newland is not directly involved in the decision to lease the reclamation plant to San Diego for expansion.

In addition, the Act requires an official to disqualify him or herself from participation in governmental decisions which indirectly have a material financial effect on a business entity in which he or she has a financial interest. Whether the effect of a decision on a business entity that is not directly involved in the decision is material depends on the financial size of the

^{3/} A business entity is directly involved in a decision before the district when the business either personally or by an agent initiates the proceeding in which the decision will be made by filing an application, claim, appeal, or similar request, or is a named party in, or is the subject of, the proceeding concerning the decision before the official or the official's agency. (Regulation 18702.1(b).) For example, if the decision involved the purchase of sewer hookups by Newland, Newland would be directly before the district and you could not participate.

business entity. Regulation 18702.2 (copy enclosed) describes the standards, based on the financial size of the business entity, to determine whether the effect of the decision is material.

We cannot determine the magnitude of the financial effect on Newland that will be caused by the decisions on the reclamation plant. We must leave this factual determination of materiality to you within the guidelines provided by Regulation 18702.2. However, Regulation 18702.3(d) (copy enclosed) does set forth factors that you may consider in determining whether the decisions will have a material financial effect on the value of Newland's real property.

1. The proximity of the property which is the subject of the decision and the magnitude of the proposed project or change in use in relationship to the property in which the official has an interest;

2. Whether it is reasonably foreseeable that the decision will affect the development potential or income producing potential of the property;

3. In addition to the foregoing, in the case of residential property, whether it is reasonably foreseeable that the decision will result in a change to the character of the neighborhood including, but not limited to, the effect on traffic, view, privacy, intensity of use, noise levels, air emissions, or similar traits of the neighborhood.

Regulation 18702.3(d)

For example, even though the property that is the subject of the decision is immediately adjacent to the Newland development site, if the magnitude of the proposed change in use in relationship to Newland's property is relatively minor, the financial impact on Newland may also be minor. In other words, if the expansion of the plant will make the burden of having a reclamation plant next door only slightly worse than it already was, the financial effect of the expansion may be minimal.

Further, since Newland intends to develop the property for residential purposes, you should also consider any effect on the character of the proposed residential development with respect to traffic, view, privacy, intensity of use, noise levels, air emissions, or similar traits of the neighborhood. All these factors should be considered in determining the financial effect the decision will have on Newland's property, and consequently on Newland as a business entity.

However, even where an official determines that he or she has a financial interest which will be financially affected by the decision, the official may participate if the effect on the

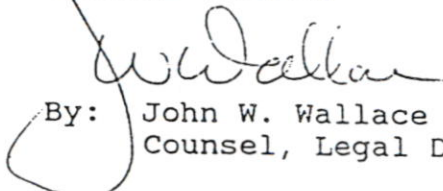
official's interest is not distinguishable from the effect on the public generally. For the "public generally" exception to apply, the decision must affect Newland in substantially the same manner as it will affect a significant segment of your jurisdiction. (Regulation 18703, copy enclosed; In re Legan (1985) 9 FPPC Ops. 1, copy enclosed.)

However, because Newland's property is so close to the property subject to the board's decision, it appears unlikely that Newland will be affected in a manner similar to the rest of the jurisdiction, or even a significant segment of the jurisdiction. Consequently, the "public generally" exception would not apply to these facts.

If any further questions regarding this matter, please feel free to contact me at (916) 322-5901.

Sincerely,

Kathryn E. Donovan
General Counsel


By: John W. Wallace
Counsel, Legal Division

KED:JWW:plh

Enclosures