



California Fair Political Practices Commission

January 27, 1992

Jake Zahavi, Director
Mendocino City Community Services District
P.O. Box 1171
Mendocino, California 95460

Re: Your Request For Informal Assistance
Our File No. I-91-532

Dear Mr. Zahavi:

This letter is in response to your request for advice regarding the conflict of interest provisions of the Political Reform Act (the "Act").¹ Your letter does not address a particular decision before the Mendocino Community Services District, but rather seeks general guidance regarding decisions pertaining to the water system in your jurisdiction. Accordingly, we are treating your letter as a request for informal assistance pursuant to the provisions of Regulation 18329.²

QUESTION

As an elected Director of the Mendocino City Community Services District ("MCCSD") who is both a resident and business owner in the jurisdiction, may you participate in governmental decisions pertaining to the water system in the jurisdiction?

CONCLUSION

A Director of the MCCSD may participate in decisions pertaining to the water system in the jurisdiction unless there is a reasonably foreseeable material financial effect, distinguishable from the effect on the public generally, on his or

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).)

her economic interests. As an owner of real property and of a bed and breakfast inn in the jurisdiction, you may have to disqualify yourself from participation in water system decisions if the effect of the decisions on your business, your real property, or your income or personal expenses is material, as discussed below.

FACTS

You are an elected Director of the MCCSD. As a Director you participate in making policy and administering all matters pertaining to sewage and water in your jurisdiction. You are also a resident of the district and the owner of a bed and breakfast establishment in the district. In a telephone conversation on December 23, 1991, you informed me that your residence and your business are located on the same parcel of real property.

Drought conditions have resulted in a water shortage in your jurisdiction, and the MCCSD is considering a municipal water system that could address many of the problems you perceive in connection with the water situation in the district. Among the benefits you foresee are better fire protection (that will result in lower insurance rates) and safer drinking water than is presently available.

You are concerned that, as a resident and business owner in the district, you may have a conflict of interest in connection with participation in decisions pertaining to the proposed water system.

ANALYSIS

Section 87100 prohibits public officials from making, participating in, or using their official position to influence any governmental decision in which they know or have reason to know they have a financial interest. An official has a financial interest in a decision if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official or a member of his or her immediate family, or on:

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

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

(c) Any source of income, other than gifts and 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.

(e) Any donor of, or any intermediary or agent for a donor of, a gift or gifts 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.

For purposes of this section, indirect investment or interest means any investment or interest owned by the spouse or dependent child of a public official, by an agent on behalf of a public official, or by a business entity or trust in which the official, the official's agents, spouse, and dependent children own directly, indirectly, or beneficially a 10-percent interest or greater.

Section 87103.

As a director of a municipal community services district, you are a public official. (Section 82048.) You have an interest, presumably over \$1000 in value, in your bed and breakfast business. You also have an interest in real property presumably worth more than \$1,000. Your business, the Agate Cove Inn, is also a source of income to you of more than \$250 per year. Accordingly, you are prohibited from participating in a decision if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from the effect on the public generally, on you or on your business interest or on your real property interest.

Foreseeability

The effects of a decision are reasonably foreseeable if there is a substantial likelihood that they will occur. To be foreseeable, the effects of a decision must be more than a mere possibility; however, certainty is not required. (Downey Cares v. Downey Community Development Com. (1987) 196 Cal.App.3d 983, 989-991; Witt v. Morrow (1977) 70 Cal.App.3d 817, 822; In re Thorner (1975) 1 FPPC Ops. 198.) The Act seeks to prevent more than actual conflicts of interest; it seeks to prevent even the appearance of a possible conflict of interest. (Witt v. Morrow, supra at 823.) It is foreseeable that installation of such a basic improvement as a municipal water system will have a financial effect on your real property and business interests. You yourself foresee such benefits as lower insurance rates from the new system.

Materiality

Even if a decision will have a foreseeable financial effect on your real property or business interests, you will not have to disqualify yourself from participation in the decision to install the new water system unless the effect on any of your economic interests is material. The facts indicate that your interests will not be directly involved in the water system decision (see Regulation 18702.1); therefore it is necessary to determine whether the financial effects on your interests meet the tests set forth in Regulation 18702.2 and Regulation 18702.3, for business entities and real property interests indirectly involved in a governmental decision.

Regulation 18702.2 determines materiality by using the size of a business as the basic criterion and then setting forth various dollar amounts as threshold amounts for the differing size categories. We have not been given facts sufficient to determine the category into which your bed & breakfast business falls; if your Agate Cove Inn is a relatively small business, we suggest you look at 18702.2(g).

Subdivision (g) states that the effect of a governmental decision on a business entity is 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; or
- (2) The decision will result in the 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.

Thus, if, for example, the decision regarding approval of the municipal water system would foreseeably reduce your expenses by \$2,500 or more in a fiscal year, then the decision would be considered to have a material financial effect on your business. You must determine which subdivision in Regulation 18702.2 applies to the Agate Cove Inn in order to evaluate the materiality of the water system decision, since you have the requisite facts which pertain to the size of the business.

Material financial effect on real property interests is analyzed differently from the method employed for business interests. The relevant regulation to apply to real property interests indirectly involved in a decision is Regulation 18702.3, which is as follows:

(a) The effect of a decision is material as to real property in which an official has a direct, indirect or beneficial ownership interest (not including a leasehold interest), if any of the following applies:

(1) The real property in which the official has an interest, or any part of that real property, is located within a 300 foot radius of the boundaries (or the proposed boundaries) of the property which is the subject of the decision, unless the decision will have no financial effect upon the official's real property interest.

(2) The decision involves construction of, or improvements to, streets, water, sewer, storm drainage or similar facilities, and the real property in which the official has an interest will receive new or substantially improved services.

(3) The real property in which the official has an interest is located outside a radius of 300 feet and any part of the real property is located within a radius of 2,500 feet of the boundaries (or the proposed boundaries) of the property which is the subject of the decision and the decision will have a reasonably foreseeable financial effect of:

(A) Ten thousand dollars (\$10,000) or more on the fair market value of the real property in which the official has an interest; or

(B) Will affect the rental value of the property by \$1,000 or more per 12 month period.

* * *

(c) For decisions which may affect an interest in real property but which do not involve a subject property from which the distances prescribed in subdivisions (a) and (b) can be determined, the monetary standards contained in subdivision (a)(3) (A) and (B) shall be applied.

(d) For a decision which is covered by subdivision (a)(3) or (b)(1) or (c), factors which shall be considered in determining whether the decision will have the effects set forth in subdivision (a)(3)(A) or (B) include, but are not limited to:

(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, effects on traffic, view, privacy, intensity of use, noise levels, air emissions, or similar traits of the neighborhood.

In your situation, since there is no particular property from which distance can be measured, we would look to subdivision (c), which requires evaluation using the monetary standards of subdivisions (a)(3)(A) and (a)(3)(B). This means that the financial effect of the water decision would be considered material to your real property interest if the property increased or decreased by \$10,000 in value or if the rental value of the property was affected by \$1,000 per 12-month period.

Public Generally

Even if it is ascertained that the effect of the proposed water system decision will have a material financial effect on you or your economic interests, you may participate in the decision if the effect is indistinguishable from the effect on the public generally. (Section 87103.) Regulation 18703 clarifies the "public generally exception," and provides, in pertinent part, as follows:

A material financial effect of a governmental decision on an official's interests, as described in Government Code Section 87103, is distinguishable from its effect 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.

Regulation 18703.

The "public" is comprised of all the persons residing, owning property or doing business in the jurisdiction of the agency in question. (In re Legan (1985) 9 FPPC Ops. 1.) In the case of the MCCSD, the jurisdiction would be the City of Mendocino. Consequently, for the "public generally" exception to apply, a decision that would materially affect any of your economic interests would have to affect a significant segment of the public of the City of Mendocino in substantially the same manner. (Dowd Advice Letter, No. A-88-214; Burnham Advice Letter, No. A-86-210.)

The Commission has never adopted a strict arithmetic test for determining what constitutes a significant segment of the public. However, in order to apply the public generally exception, the population affected must be large in number and heterogeneous in nature. (In re Ferraro (1978) 4 FPPC Ops. 62.)

In addition to comprising a significant segment of the jurisdiction, the group affected must be affected in a substantially similar way. Although it is likely that installation of a municipal water system will affect a significant segment of the jurisdiction, we have not been provided with facts that would indicate that a significant segment of the public in Mendocino would be affected in a manner similar to the effect on your economic interests by the municipal water system. If the City of Mendocino has within its boundaries a sufficient number of hotels, motels, bed and breakfast inns, restaurants, and other like establishments which would experience similar impact from the proposed water system, it is possible that the "public generally" exception might apply. In order to evaluate application of the "public generally" exception, we would need facts regarding businesses similar to yours in the jurisdiction and the anticipated impact of the new water system on those businesses.

I trust the above answers your question. If you need further information, please do not hesitate to call me at (916) 322-5901.

Sincerely,

Scott Hallabrin
Acting General Counsel



By: Susan L. Bobrow
Counsel, Legal Division

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