



RAVI MEHTA
CHAIRMAN

FAIR POLITICAL PRACTICES COMMISSION

October 16, 1995

Bradley W. Sullivan
City Attorney
City of Sutter Creek
18 Main Street
P.O. Box 366
Sutter Creek, CA 95685

Re: Your Request for Advice
Our File No. A-95-234

Dear Mr. Sullivan:

This is in response to your letter requesting advice on behalf of Mayor Heidi Boitano regarding her responsibilities under the conflict-of-interest provisions of the Political Reform Act (the "Act").¹

Please note that nothing in this letter should be construed to evaluate any conduct which may have already taken place. In addition, this letter is based on the facts presented to us. The Commission does not act as the finder of fact in providing advice. (In re Oglesby (1975) 1 FPPC Ops. 71.)

QUESTION

Under the Act, may Mayor Boitano participate in decisions regarding the Sutter Creek street improvement program which includes the city taking a strip of property owned by the Boitano Family Trust?

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, Sections 18000-18995. All references to regulations are to Title 2, Division 6 of the California Code of Regulations.

CONCLUSION

Since your facts indicate that the trust is revocable and the mayor receives no income from the trust, the mayor is not considered to have an interest in the real property held by the trust. Thus, Mayor Boitano would not be prohibited from participating in the decision in question.

FACTS

You stated that Mayor Boitano is a beneficiary and trustee of the Boitano Family Trust. Mayor Boitano has a one-quarter interest in the assets of the trust, which continues to be a revocable trust by the surviving grantors of the trust assets. The mayor also acts as a trustee of the trust, but is not compensated for her services as trustee.

The City of Sutter Creek is currently implementing a street improvement program. As part of the program, the city is aligning and widening roads, and constructing sidewalks and curbs. One of the streets that will be affected by the street improvement program abuts property owned by the Boitano Family Trust which is currently leased to the city for use as a parking lot.

ANALYSIS

Under the Act, every public official must disclose all his or her economic interests that could foreseeably be affected by the exercise of the official's duties. (Sections 81002(c), 87200-87313.) Additionally, Section 87100 of the Act prohibits any public official from making, participating in making, or otherwise using his or her official position to influence a governmental decision in which the official has a financial interest.

Section 87103 specifies that a public official has a financial interest 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, among other interests:

(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.

Under your facts, the property in question is owned by the Boitano Family Trust. As trustee to the trust in question, the mayor holds legal title to the trust and may control the trust. However, the trustee in fact takes no true ownership interest in the assets in the trust. (Estate of Getty (1978) 85 Cal.App.3d 755, 760; Regulation 18234(d).) The trustee may not treat the trust's assets as his or her own property. (Coberly v. Superior Court (1965) 231 Cal.App.2d 685, 688-689.) Thus, the mayor would not have an interest in the trust or the assets of the trust by virtue of her acting as trustee.

However, the trust may also be considered a source of income to the mayor. Regulation 18234(d) provides:

For the purposes of this section, a filer does not have a direct, indirect or beneficial interest in a trust by reason of being a trustee or co-trustee provided that the filer does not have a direct, indirect or beneficial interest (as described in subsection (c)) in the trust. However, income that is otherwise reportable and is received by the filer for the performance of trustee services must be reported.

(Emphasis added.)

Your facts indicate that the mayor receives no income for acting as trustee for the trust. Thus, the trust is not considered a source of income to the mayor as set forth in Section 87103(c).

Finally, the interests of an individual also include a pro-rata share of the interests of any trust in which the individual or individual's spouse owns, directly, indirectly or beneficially, a 10-percent interest or greater. (See e.g., Section 82030; Section 82033; Section 82034.) You stated that the mayor has a 25-percent interest in the trust assets at this time. However, even where the filer's interests in the trust is 10-percent or greater, Regulation 18234 (copy enclosed)² limits the circumstances under which the beneficiary of a trust will be considered to have an interest in the pro-rata share of interests in real property and investments held by the trust, and income to the trust. (Van de Kamp Advice Letter, No. A-88-169.)

² This regulation has been applied to disqualification, as well as disclosure issues under the Act. (See, Hill Advice Letter, A-80-07-090; O'Shea Advice Letter, No. A-85-065.)

Regulation 18234 requires disclosure of the pro-rata share of property and investments of the trust, and income to the trust if the beneficiary has a 10-percent interest or greater in the trust and:³

(A) Presently receives income; or

(B) Has an irrevocable future right to receive income or principal. For purposes of this subsection, an individual has an irrevocable future right to receive income or principal if the trust is irrevocable and:

1. No powers exist to consume, invade or appoint the principal for the benefit of beneficiaries other than the filer or if there are such powers they are limited by an ascertainable standard relating to the health, education, support or maintenance of said beneficiaries; or

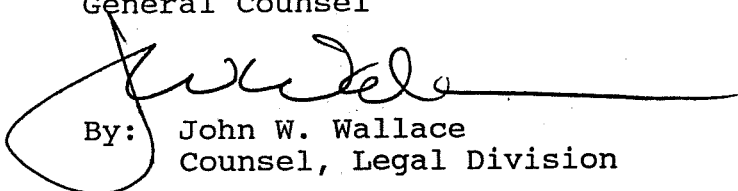
2. Under the terms of the trust, no one else can designate the persons who shall possess or enjoy the property or the income therefrom.

You stated that the mayor does not receive any income from the trust, either as a beneficiary or trustee. You also stated that the trust was a revocable trust. Pursuant to the regulation, the assets of the revocable trust would not be considered interests of the mayor. Consequently, the trust property would also not be considered the mayor's property for disclosure and disqualification purposes.

If you have any further questions regarding this matter, please feel free to contact me at (916) 322-5660.

Sincerely,

Steven G. Churchwell
General Counsel


By: John W. Wallace
Counsel, Legal Division

³ Different rules apply where the person in question is the maker of a trust. However, according to your facts, this is not the case.