

RAVI MEHTA
CHAIRMAN



FAIR POLITICAL PRACTICES COMMISSION

May 7, 1997

Michael C. Fitzpatrick
County Counsel
County of Trinity
Post Office Box 1613
Weaverville, California 96093

**Re: Your Request for Advice
Our File No. A-97-210**

Dear Mr. Fitzpatrick:

This letter is a response to your request on the behalf of an unnamed public official for advice regarding the provisions of the Political Reform Act (the "Act").¹ Since your advice request does not name a specific public official, we are treating your request as one for informal assistance.² (Regulation 18329.)

QUESTION

May a member of the Trinity County Board of Supervisors participate in the Board's decision to reroute Highway 299 away from the business district of a city where the public official owns a lubrication business?

CONCLUSION

If the decision has a foreseeable material financial effect on the lubrication business of the public official distinguishable from the public generally, the public official may not participate in the decision.

¹ Government Code sections 81000 - 91014. Commission regulations appear at title 2, sections 18109 - 18995, 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. (Section 83114; Regulation 18329(c)(3).)

FACTS

One of the members of the Trinity County Board of Supervisors owns an automobile lubrication business on Highway 299 which passes directly through the community of Weaverville. Weaverville is not an incorporated city but it is one of the larger population centers in the county. It has approximately 3,000 people who live in the immediate area. The entire county has a population of approximately 14,000.

Highway 299 in Weaverville has many small businesses located on it. In addition to the above-referenced "fast-lube" business, there are service stations, motels, banks, a movie theater, several small offices, restaurants, several other commercial businesses of various kinds, a library, a courthouse, a museum, grocery stores, fast food outlets, a lumber mill, and numerous other types of establishments. Most of the commerce in the community of Weaverville occurs along Highway 299 or within just a few "blocks" of the highway.

The board is considering a proposed bypass which would reroute traffic on Highway 299 away from the business area of town, leaving the existing route as a business loop only. The public official who owns the lubrication business claims that 95% of his lube business is generated from residents of the Weaverville community, not from tourists or other motorists passing through and that the impact on his business will be minimal and not different than other businesses located on the highway. This supervisor asked you to request an advice opinion from the Commission.

ANALYSIS

1. *Economic Interests*

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 the official or a member of his or her immediate family or on, among other things,

"(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."

(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.”

You state that the public official owns a lubrication business. Presumably, the public official has an investment in that business of one thousand dollars or more and he has received \$250 or more from the business within the past 12 months. Therefore the business constitutes an economic interest according to subdivisions (a) and (c) of Section 87103. The public official may not participate in any decision that will have a foreseeable and material financial effect on the lubrication business if the effect is distinguishable from the public generally.³

2. *Foreseeability*

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. (*Downey Cares v. Downey Community Development Commission* (1987) 196 Cal.App.3d 938; *In re Thorner* (1975) 1 FPPC Ops. 198.) Since the public official has stated that there will be a financial effect, albeit minimal, on his business if the bypass is created and since the public official states that 5% of his business comes from through traffic, we find that a financial effect on his business (and real property) is foreseeable.

3. *Materiality*

Assuming foreseeability, disqualification is still only required where the foreseeable effect on the public official's economic interest is material. The Commission has adopted a series of regulations which provide guidance concerning whether the foreseeable financial effects of a decision are material. (Regulation 18702.) The standard for materiality differs depending on the type of economic interest involved and whether the economic interest is directly or indirectly affected by the decision. Regulation 18702.1 provides definitions for when economic interests are directly involved in a decision. According to your facts, the public official's economic interests are indirectly affected. If an economic interest that is a business entity is affected indirectly as discussed below, the public official may not participate.

Whether the indirect effect of a decision on a business entity, such as the lubrication business, is material depends on the financial size of the business entity. Regulation 18702.2 provides in subdivision (g) for a relatively small business entity, the indirect effect of a decision

³ You do not mention in your letter whether the public official has an interest in real property in the property where the business is located. Attempts to reach you by phone were made. I will provide guidance on how to analyze this possible economic interest.

is material where:

- “(1) The decision will result in an increase or decrease in the gross revenue 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 the increase in the value of assets or liabilities of \$10,000 or more.”

The public official must decide whether any of the preceding would be met. For example, if the official's gross revenues are \$200,000 or more in a fiscal year, he would be disqualified because 5% or \$10,000 of his gross revenues would be affected by the decision. If any of the standards are met, then the lubrication business will be considered a disqualifying economic interest. The Commission does not act as the finder of fact in providing advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.)

Whether a foreseeable financial effect is material on a real property interest, not including a leasehold interest, indirectly involved in a decision is determined by Regulation 18702.3. (Copy enclosed.) Please consult this regulation if appropriate.

Whether a foreseeable financial effect is material on a leasehold interest valued at over \$1,000 indirectly involved in a decision is determined by Regulation 18702.4. (Copy enclosed.) Please consult this regulation if appropriate.

4. *Public Generally*

Even if the reasonably foreseeable financial effect of a decision is material, disqualification is required only if the effect is distinguishable from the effect on the public generally. (Section 87103.) For the “public generally” exception to apply, a decision must affect the official's interests in *substantially the same manner* as it would *a significant segment of the public*. Regulation 18703(a)(1) sets out the test to determine what constitutes a *significant segment of the public*:

- “(A) For decisions that affect the official's economic interests (excluding interests in a business entity which are analyzed under subdivision (B);
- (i) Ten percent or more of the population in the jurisdiction of the official's agency or the district the official represents, or
- (ii) Ten percent or more of all property owners, all home owners, or all households in the jurisdiction of the official's agency or the district the official represents, or

(B) For decisions that affect a business entity in which the official has an interest as set forth in Section 87103, fifty percent of all businesses in the jurisdiction or the district the official represents, so long as the segment is composed of persons other than a single industry, trade, or profession;

(C) For decisions that affect any of the official's economic interests, the decision will affect 5,000 individuals who are residents of the jurisdiction; or,

(D) The decision will affect a segment of the population which does not meet any of the standards in subdivisions (a)(1)A through (a)(1)C, however, due to exceptional circumstances regarding the decision, it is determined such segment constitutes a significant segment of the public generally."

Regulation 18703(a)(2) determines when a decision affects a significant segment of the public *in substantially the same manner*:

"Substantially the Same Manner: The governmental decision will affect the official's economic interest in substantially the same manner as it will affect the significant segment identified in subdivision (a)(1) of this regulation."

Again, the public official must determine for himself or herself whether this exception applies with respect to the county, the jurisdiction of the public official's agency. (Section 82035.) However, you have not indicated that 50% of the businesses in the county will be affected in the same manner. Therefore, it is unlikely that the exception applies as to his business interest. You have provided no information as to his real property interests or other sources of income. Therefore, we can only give you this general advice.

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

Sincerely,

Steven G. Churchwell
General Counsel



By: Marte Castaños
Staff Counsel, Legal Division

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