

RAVI MEHTA
CHAIRMAN



FAIR POLITICAL PRACTICES COMMISSION

May 28, 1997

Darrell W. Larsen
Office of the County Counsel
County of Sutter
1160 Civic Center Boulevard
Yuba City, California 95993

**Re: Your Request for Advice
Our File No. A-97-231**

Dear Mr. Larsen:

This letter is a response to your request for advice regarding the provisions of the Political Reform Act (the "Act").¹ The Commission does not act as finder of fact in providing advice. (In re *Oglesby* (1975) 1 FPPC Ops. 71.) As such, this letter is based on the facts you have presented to us.

QUESTION

May a county supervisor participate in decisionmaking related to rezoning a parcel of property that may be used for building a mini-market when the supervisor is employed by an engineering firm that prepared a mini-market site plan for the owner of the property?

CONCLUSION

Any decisions related to rezoning will not materially affect the supervisor's employer, therefore the supervisor does not have a conflict of interest and may participate in any rezoning decisions.

FACTS

In November of 1994, during a comprehensive review of the countywide general plan for Sutter County, a number of citizens objected to a proposed mini-market to be located in a predominately residential area on property then zoned for commercial and industrial use. In November of 1996, the general plan revision was adopted by the Sutter County Board of

¹ Government Code sections 81000 - 91014. Commission regulations appear at title 2, sections 18109 - 18995, of the California Code of Regulations.

Supervisors and the subject property designation was changed to low density residential. As a consequence, the existing commercial/industrial zoning became inconsistent with the adopted county general plan, a result not permitted by Government Code section 65860.

The county is in the process of eliminating a number of inconsistencies between existing zoning and the recently adopted general plan. The mini-market parcel is one of those included in the study being prepared by county staff for presentation to the board of supervisors with recommendations for elimination of the prohibited inconsistencies. Because the property owner has expressed an interest in proceeding with the mini-market, including an intention to apply for a building permit, the board of supervisors has recently adopted, as contemplated by Government Code section 65858, an interim zoning ordinance prohibiting all uses on the property other than those allowed in the county's single family residential district. This will prevent construction of the mini-market until the board of supervisors consider the countywide rezoning ordinance which will bring county zoning into consistency with the adopted general plan.

Sutter County Supervisor Dennis Nelson is a salaried employee of a local civil engineering firm. In February of 1997, that firm prepared for the property owner a site plan showing the location of parking, a card-lock gasoline island, and the mini-market building on the subject property. The charge for the work and prints was \$143 which has been paid. Another engineering firm in Yuba City now represents the property owner in his relations with the county on this project. Annual gross revenues of the engineering firm employing Supervisor Nelson approximate \$600,000. If they had continued to be involved with the project it would be anticipated that total revenues to the engineering firm from the project would have approximated \$4,000. The site plan prepared for the property owner by the engineering firm was prepared by an engineer in the firm, and not Supervisor Nelson. Supervisor Nelson's involvement with the site plan was limited to answering some questions by the engineer regarding county parking requirements, the existing zoning on the property, and providing a basic, generalized, free-hand sketch showing the relationship of a building, parking, and a gas island on a lot. Only minutes were spent on the sketch, it was intended for internal office use only, and none of Supervisor Nelson's time was charged to the property owner.

ANALYSIS

Section 87100 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. As a county supervisor, Mr. Nelson is a public official as defined in the Act. (Section 82048.)

Section 87103 specifies that 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 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)(d).)

The engineering firm that employs Supervisor Nelson is an economic interest to him under both of the above tests. Supervisor Nelson is an employee of the firm, and the firm has presumably been a source of income to him of over \$250 in the last 12 months. Thus, Supervisor Nelson must disqualify himself from any governmental decision where it is reasonably foreseeable that the decision will have a material financial effect on the engineering firm.

Because the engineering firm is not the subject of the proceeding before the board of supervisors, the firm is not deemed to be directly² materially affected, and Supervisor Nelson is not automatically disqualified. Instead, we must determine whether the decision will indirectly have a material financial effect on Supervisor Nelson’s employer. Regulation 18702.2 addresses whether a decision is material as to a business entity that is indirectly involved in a particular decision. Supervisor Nelson’s employer is a relatively small, local engineering firm. Based on these facts, the appropriate test to determine whether an effect is material is found in Regulation 18702.2(g). Under that test, the indirect effect of a decision on the entity is material when:

- (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. (Regulation 18702.2(g).)

Under the facts that you have provided, Supervisor Nelson’s employer will not be materially affected by this decision. The engineering firm charged only \$143 to the property owner for preparing a preliminary site plan. Therefore, assuming this will be the only work performed by the engineering firm for the property owner, Supervisor Nelson does not have a conflict of interest and may participate in any rezoning decisions.

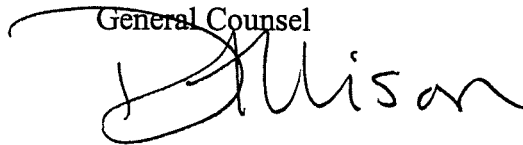
² Regulation 18702.1 provides that a business entity is directly involved in a decision before an official’s agency when the entity, either personally or by an agent: “(1) Initiates the proceeding in which the decision will be made by filing an application, claim, appeal, or similar request or; (2) Is a named party in, or is the subject of, the proceeding concerning the decision before the official or the official’s agency. (3) A person or business entity is the subject of a proceeding if a decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the subject person or business entity.”

As a caveat, you should know that 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. (*Canady* Advice Letter, No. I-93-206.) A financial effect is reasonably foreseeable when it is substantially likely to occur. Certainty is not required. Likewise, a mere possibility is insufficient to trigger the conflict-of-interest provisions of the Act. (*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.) You have indicated by your letter that another engineering firm in Yuba City now represents the property owner in his relationship with the county on this project. Nothing in your letter indicates that Supervisor Nelson's employer may do work on the project in the future. If Supervisor Nelson's firm is "substantially likely" to do work for the property owner in the future on this project, the facts would need to be re-analyzed to determine whether or not a conflict exists.

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

Sincerely,

Steven G. Churchwell
General Counsel

A handwritten signature in black ink that reads "Allison". The signature is written in a cursive style with a large, sweeping initial "A" that extends to the left and underlines the first part of the name.

By: Deborah Allison
Staff Counsel, Legal Division

SGC:DA:ak