



FAIR POLITICAL PRACTICES COMMISSION

P.O. Box 807 • 428 J Street • Sacramento, CA 95812-0807

(916) 322-5660 • Fax (916) 322-0886

August 28, 1998

Louis D. Boitano
Supervisor, District IV
Amador County Board of Supervisors
500 Argonaut Lane
Jackson, California 95642

**Re: Your Request for Advice
Our File No. A-97-557(a)**

Dear Mr. Boitano:

This letter is in response to your request for advice regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").¹ In our previous letter to you, we provided informal assistance regarding whether your interest in a trust created a disqualifying financial interest for you. (*Boitano* Advice Letter, No. A-97-557.) You have requested further assistance based on additional facts.

QUESTION

For purposes of sections 87100 and 87103, do you have an economic interest in real property owned by the Boitano Family Trust?

CONCLUSION

No. Applying regulation 18234, we conclude that you do not have an economic interest in real property owned by the Boitano Family Trust.

FACTS

You are a member of the Amador County Board of Supervisors. You own a 10 percent interest in a family trust named the "Boitano Family Trust." The trust holds various parcels of

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

property located in Amador County. Specifically, the trust owns property in close proximity to the Lincoln Mine. The Lincoln Mine currently operates under a conditional use permit issued by the county in 1993. The company now wishes to change its operating procedures and add newly acquired property. In order to do this, the mine must obtain a new use permit.

When the original use permit application for the Lincoln Mine/Sutter Gold Project came before the board in 1993, you stepped down from the decision. The family trust had owned real property near the Lincoln Mine. In addition, the principal owner of the Lincoln Project, U.S. Energy, held the subsurface mineral rights to a portion of the family trust property.

According to the additional information you provided, the real property near the Lincoln Mine was the community property of your father and mother. Half of the community property was included in your mother's share of the trust which became irrevocable upon her death. At present, you have no right to receive any income from the trust. Under the terms of the trust, the trustees may invade the principal of the trust for the benefit of your father and any one or more of the other beneficiaries "as the Trustees in the Trustees' discretion consider necessary for his/her/their health, education, maintenance or support."

ANALYSIS

The Act prohibits a public official from making, participating in making, or in any way attempting to use his or her official position to influence a governmental decision in which the official has a financial interest. (Section 87100.) As a county supervisor, you are a "public official" under the Act. (Section 82048.)

Section 87103 provides that an official has a financial interest in a governmental decision within the meaning of section 87100 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 on one of five enumerated economic interests including any real property in which the public official has a direct or indirect interest worth \$1,000 or more. (Section 87103(b).)

You are a beneficiary of a trust that owns real property near the Lincoln Mine. An "interest in real property" of an individual includes a pro rata share of the interests in real property of any trust in which the individual owns, directly, indirectly, or beneficially, a 10 percent interest or greater. (Section 82033.) Your interest in the family trust is 10 percent or greater.

However, even where an official's interest in a trust is 10 percent or greater, we have advised that regulation 18234 limits the circumstances under which the beneficiary of a trust will be considered to have an economic interest in real property held by the trust for purposes of the disqualification provisions of sections 87100 and 87103. (*Boitano Advice Letter, supra.*)

Regulation 18234 requires disclosure of the pro rata share of property held by the trust if the beneficiary has a 10 percent interest or greater in the trust and:

- “(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.” (Regulation 18234(c).)

Applying the regulation, a public official does not have an economic interest in the assets of an irrevocable trust if unlimited powers exist to invade the trust principal for the benefit of someone other than the official, or someone other than the official can change the beneficiaries of the trust. (*Van de Kamp* Advice Letter, No. A-88-169.) In either circumstance, the official might not receive his or her share of the trust principal or income due to events beyond his or her control. Thus, the official’s interest in the trust is too speculative to require disqualification.

The information provided indicates that the principal of the trust can be invaded for the benefit of your father or any of the other beneficiaries. However, even if there is a power to invade the principal, the official will have an economic interest in the trust if the power to invade is limited by an “ascertainable standard related to the health, education, support or maintenance of said beneficiaries.” Here, the power to invade is limited to expenses that the trustees consider “necessary for health, education, maintenance or support.” Relying on *Estate of Nunn* (1974) 10 Cal.3d 799, we have previously advised that a power to invade the principal “as necessary for the proper, care and maintenance of the decedent’s wife and sister” did not limit the trustee’s discretion to an ascertainable standard. (*Van de Kamp* Advice Letter, *supra*.) The limitations imposed on the trust in question appear similar to those set forth in the *Van de Kamp* letter. (*McAndrews* Advice Letter, No. A-91-403.) Thus, the power to invade the principal is not limited to an ascertainable standard.

Accordingly, you do not have economic interest in the real property interest held by the Boitano Family Trust.

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 "Julia Butcher". The signature is written in a cursive style with a large initial "J" and a stylized "B".

By: Julia Butcher
Staff Counsel, Legal Division

SGC:JB:tls