



FAIR POLITICAL PRACTICES COMMISSION

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June 23, 1998

Mr. William Murano
Lassen County Counsel
221 South Roop Street
Susanville, California 96130

Mr. Everd McCain
P. O. Box 448
Susanville, California 96130

**Re: Your Requests for Advice
Our File Nos. I-98-081 and A-98-157**

Dear Mr. Murano and Mr. McCain:

This letter is in response to your requests for advice regarding the provisions of the Political Reform Act (the "Act").¹ Mr. Murano, Lassen County Counsel requested advice from the Commission, regarding a possible conflict of Supervisor McCain's, based on his duty to advise the board, rather than upon specific authorization. (Regulation 18329(c)(1).) Supervisor McCain himself also requested advice from the Commission about the same potential conflict. Because they involve the same circumstances and question, our responses to Mr. Murano and Mr. McCain's requests are consolidated in this letter.

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 Ogelsby* (1975) 1 FPPC Ops. 71.)

QUESTION

May Supervisor McCain participate in the decision about whether to modify the local surface mining budget?

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

CONCLUSION

Supervisor McCain may participate in a decision about whether to modify the local surface mining budget, unless there is a substantial likelihood that the decision will result in his business, McCain and Associates, having a change in expenses of \$2,500 or more in a fiscal year, a change in gross revenues of \$10,000 per fiscal year, or a change in the value of assets or liabilities of \$10,000.

FACTS

Lassen County Supervisor Everd McCain is the sole owner of McCain and Associates, a civil engineering and design business. Supervisor McCain's business, McCain and Associates, together with Ford Construction Company, undertook construction of an airport runway measuring 4,300 feet by 50 feet, having obtained the relevant use permits for construction of the airport. Grading and excavation work were necessary to complete construction of the airport runway. Ford Construction Company excavated and removed approximately 60,000 cubic yards of material during the airstrip construction.

Lassen County sued Mr. McCain to enjoin a mining operation being conducted without obtaining a permit under the local ordinances which implement the state Surface Mining and Reclamation Act ("SMARA"). (Cal. Public Resources Code 2710 et seq.) The county argued that the excavation of materials from the airport runway site constituted the operation of a surface mine. The county lost the lawsuit in the trial court. The trial court found that the airport construction project was an "engineered work," not a "surface mine," and that the airport construction project was thus exempt from the requirements of SMARA. (*County of Lassen v. McCain et al.* (Super. Ct. Lassen County, 1996, No. 24431), Findings Nos. 28, 33, 37 and 39.)

Lassen County has appealed the trial court's decision and the matter is scheduled for argument before the Court of Appeal in late June. A primary issue at the trial court level and in the appeal is whether a permit was required under SMARA for operating a surface mine in order to perform the excavation necessary to construct the airport runway.

Supervisor McCain is proposing as an agenda item for the board of supervisor's consideration, the question of whether to modify the local surface mining budget to reduce income and expenditures by \$20,000. The county counsel, Mr. Murano, and Supervisor McCain sought the Commission's written advice as to whether Mr. McCain's participation in this decision would give rise to a conflict of interest, in light of the above litigation.

Mr. Murano and Supervisor McCain expressed differing views as to what the effect of a reduction in the local surface mining budget would be. Mr. Murano submitted a staff report stating that Lassen County's surface mining program is administered by one person, and a budget

reduction would likely lead to layoffs, thereby substantially hindering the county's ability to administer the required surface mining regulations locally. Mr. Murano believes that if the Court of Appeal reverses the trial court, and finds that a permit was required for excavations to build the airport or is required for any future excavations from that site, and Mr. McCain thereby has to comply with the local ordinance, there is likely to be no one to administer the ordinance should the budget be reduced. Mr. Murano thus believes that Supervisor McCain may have a conflict of interest in voting on the surface mining budget reduction.

Supervisor McCain believes that the SMARA program would be more effectively administered by the state, not the county. He believes the county is not properly enforcing the provisions of SMARA, is being too lenient on existing mine operators, and is not protecting the public interests, which may ultimately expose county taxpayers to financial and environmental liability. He is concerned that the biggest mine in Lassen County has worked with the county to create a regulatory situation that it controls and influences, and that Lassen County is letting the major mine violate SMARA by having an inadequate reclamation plan and other deviations from SMARA requirements. These concerns are expressed in Supervisor McCain's letter dated September 18, 1997, to the State Mining and Geology Board, which he submitted with his request for advice.

Further, Supervisor McCain states that the SMARA law will be in effect irrespective of whether it is administered by the state or the county, and that based on other county's experiences, the state usually charges more and it is more difficult to process permits with the state than with local jurisdictions. Thus, if the state were to administer SMARA, he believes the permit process would probably be more expensive and difficult.

Mr. Murano and Supervisor McCain also had differing views about the effect of the litigation results. Mr. Murano anticipates that if the appellate court reverses the trial court's decision, and finds that the local SMARA regulations apply, a SMARA permit would be required to be obtained for the airport site and annual inspections would be needed. Supervisor McCain states that the airstrip construction is already completed and therefore there would be no present need to obtain any SMARA permits to provide material for its construction. He believes the appellate court ruling could only require that if he or any company wanted to haul materials from the airport site in the future, a SMARA permit would be necessary. However, no additional development is currently planned for the airstrip.

Typically, the entity that applies for a SMARA permit is the operator of a surface mining operation. Supervisor McCain stated that neither he personally nor his civil engineering and design firm, McCain and Associates, regularly applies for SMARA permits or has any plans to apply for a SMARA permit in the future.

ANALYSIS

The primary purpose for the conflict-of-interest provisions of the Act is to ensure that public officials, whether elected or appointed, perform their duties in an impartial manner, free from bias caused by their own financial interests. In furtherance of this goal, section 87100 of the Act prohibits a 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 87100.)

1. Economic Interest. Section 87103 of the Act provides that an official has a financial interest in a 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, 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 [\$290] 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.)

A "public official" is defined as a member, officer, employee, or consultant of a state or local government agency. (Section 82048; Regulation 18700.) As a member of the Lassen County Board of Supervisors, Mr. McCain is considered a public official under the Act. Further, a decision whether to modify the surface mining budget is a governmental decision under regulation 18700(b). McCain and Associates is an economic interest of Supervisor McCain's under section 87103(a) and (d), because he has an investment worth more than \$1,000 in the business, and he is the sole owner of the business.

Therefore, Supervisor McCain may not participate in a decision about whether to modify the local surface mining budget, if it is *reasonably foreseeable* that the decision would have a *material financial effect* on his business, McCain and Associates.

2. Foreseeability and Materiality. An effect of a decision is considered reasonably foreseeable under the Act if there is a substantial likelihood that it will occur. Certainty is not required, but the effect must be more than a mere possibility. (*Downey Cares v. Downey Community Development Comm.* (1987) 196 Cal.App.3d 983, 989; *Witt v. Morrow* (1977) 70 Cal.App.3d 817, 822.)

Whether the effects of a given decision are considered material is determined by reference to the Commission's regulations, which distinguish whether an official's economic interest is *directly or indirectly* involved in a decision. In this case, Supervisor McCain's business is not *directly* involved in a decision before the board of supervisors: the business is not filing an application or claim, is not the named party in or the subject of the proceeding before the board of supervisors; nor is the board of supervisors deciding whether to issue his business a permit or contract. (Regulation 18702.1.) It is possible, however, that Supervisor McCain's business may be *indirectly* affected by a decision to modify the local surface mining budget. Regulation 18702.2, copy enclosed, applies to determine materiality when a business entity is indirectly involved in a decision.

Because McCain and Associates is a "small business," regulation 18702.2(g) applies. That subsection states that a decision is material for a small business in which an official has an economic interest 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." (Regulation 18702.2(g).)

Thus, Supervisor McCain may participate in a decision to modify the local surface mining budget, unless there is a substantial likelihood that this decision would result in a change in expenses for McCain and Associates of \$2,500 or more for a fiscal year, or a change in gross revenues or the value of assets or liabilities of \$10,000 or more.

For example, if there were a substantial likelihood that McCain and Associates would be required to obtain SMARA permits in the future, and that the budget modification to the surface mining program would result in increased costs of \$2,500 or more per fiscal year in obtaining such permits, then it would be foreseeable that the decision to modify the local surface mining budget would have a material effect on McCain and Associates.

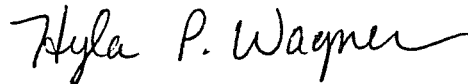
However, it is not clear from the facts presented by Mr. Murano and Supervisor McCain that the decision to reduce the local surface mining program budget would have a reasonably foreseeable material financial effect on McCain and Associates. According to Supervisor McCain, he does not regularly apply for SMARA permits, and he has no plans to seek one in the future. Further, it is not clear that even if the appellate court reversed the trial court's decision, the remedy would require Supervisor McCain to obtain a SMARA permit. Based on these facts, the pending litigation does not make it foreseeable that Supervisor McCain's participation in the decision on reducing the local surface mining budget would have a material financial effect on McCain and Associates.

3. Public Generally Exception. In his request for advice, Supervisor McCain questions whether the public generally exception applies to his situation. He states that if the county were to revise the manner in which the SMARA program was budgeted and administered, the financial effect on him would be no different than the effect on the public in general; and were he to apply for a SMARA permit in the future, he would be treated just the same as any other person. However, the public generally exception that permits an official to vote if a particular decision affects their economic interest in a manner that is indistinguishable from its effect on the public generally, does not apply to these facts. For the public generally exception to apply, the decision to modify the surface mining budget would have to affect *50 percent* of all businesses in Supervisor McCain's district in substantially the same manner as it would affect McCain and Associates. (Regulation 18703, copy enclosed.) In this case, 50 percent of the businesses in Supervisor McCain's district do not apply for SMARA permits.

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 "Hyla P. Wagner". The signature is written in a cursive style with a long, sweeping tail on the "n".

By: Hyla P. Wagner
Staff Counsel, Legal Division

Enclosures

SGC:HPW:tls