



## FAIR POLITICAL PRACTICES COMMISSION

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July 9, 1999

Anthony P. Condotti  
Atchison & Barisone  
333 Church Street  
Santa Cruz, California 95060

**Re: Your Request for Advice**  
**Our File No. A-99-154**

Dear Mr. Condotti:

This letter responds to your request on behalf of Lompico County Water District Boardmembers Hans Nielsen and Leslie Cooke for advice about the Political Reform Act (the "Act").<sup>1</sup>

### I. QUESTION

May Boardmembers Nielsen and Cooke, respectively, participate in the District decision about the adoption of new water connection fees?

### II. CONCLUSION

Ms. Cooke has a disqualifying conflict of interest in the decision about the new connection fee. As to Mr. Nielsen, we have provided you with the relevant legal analysis, and narrowed the matter to the crucial questions of fact that you and he must resolve to decide whether he is disqualified. However, we are unable to advise him further on the available facts.

### III. FACTS

The Lompico County Water District (the "District") is a special district organized and existing under the State of California's special district law. The District was formed in 1964.

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

Recently, the District retained the services of Wy'east Engineering, a civil engineering firm, to prepare a connection fee study, the purpose of which is to provide the District with a basis to determine an appropriate fee for new water connections, taking into account the proportionate replacement cost for the entire water system operated by the District. According to the Wy'east report, the "District customer base has remained constant at about 500," while the "potential build-out population" is approximately 525. For several years prior to the initiation of this study, the District has been under a moratorium imposed by the State's Department of Health Services, which precluded issuance of new meters. However, it was recently determined that, to the extent that existing meters have been surrendered since the imposition of the moratorium, the District could issue new meters so long as the number of meters permitted under the moratorium is not exceeded.

At present, there are a handful of meters (6-12) that will be available to customers once the fee study is adopted. According to the Wy'east report, when, and if, the moratorium is lifted, a total of approximately 25 new meters could conceivably be issued, given the present build-out in the District and the inventory of vacant developable property without current water service.

Boardmember Leslie Cooke is the only boardmember who has formally applied for a new water connection to serve her existing residential parcel. It is your understanding that there are presently four or five other formal applications pending. Ms. Cooke already has a single water meter serving her residence. She seeks an additional meter in order to service a second residence that she is constructing on her property. Ms. Cooke actively sought a new connection from the District prior to her election to the board. Although a decision has not yet been made, it seems likely that the new connection fee will be in the vicinity of \$13,000.

Although there are only a handful of vacant developable parcels within the District which may have a need for a new water connection, it is possible that at least some of the roughly 500 existing ratepayers within the District, may apply for a second meter to serve a residential parcel which already receives water service.

Boardmember Hans Nielsen has not submitted an application for a water meter; however, he owns undeveloped real property within the District, which does not currently receive water service, and thus could potentially benefit from a new water connection.

#### IV. ANALYSIS

The Act's conflict-of-interest provisions ensure that public officials will perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests of persons who have supported them. (Section 81001(b).) Specifically, 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*.

To say that a public official has a “financial interest” in a governmental decision, within the meaning of the Act, is to conclude that it is reasonably foreseeable that the governmental decision will have a material financial effect on one or more of the public official’s economic interests. (Section 87103; Regulation 18700(a).) The Commission has adopted an eight-step analysis for deciding whether an individual has a disqualifying conflict of interest in a given governmental decision. (Regulation 18700(b)(1)-(8).) The following advice applies that eight-step analysis.

**A. Ms. Cooke and Mr. Nielsen are public officials covered by the Act.**

The Act’s conflict-of-interest provisions apply only to “public officials.” (Sections 87100, 87103; Regulation 18700(b)(1).) As Members of the District Board, Ms. Cooke and Mr. Nielsen are “public officials,” for purposes of the Act (see Sections 82048, 82041), and the conflict-of-interest rules apply to them.

**B. The District’s new connection fee decision is covered by the Act.**

The Act’s conflict-of-interest provisions apply only where the public official “*make[s], participate[s] in making, or in any way attempts to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest.*” (Section 87100; Regulation 18700(b)(2).) By deliberating and voting on the new connection fees, Ms. Cooke and Mr. Nielsen would be making (Regulation 18702.1) and participating in making (Regulation 18702.2) governmental decisions, and thus engaging in the kind of activity covered by the Act’s conflict-of-interest rules.

**C. Identifying the Members’ respective economic interests.**

1. Introduction.

The Act’s conflict-of-interest provisions apply only to conflicts arising from *economic interests*. The “economic interests” from which conflicts of interest may arise are defined in Regulations 18703-18703.5. Identifying which, if any, of these economic interests are held by a public official is the third step in analyzing a potential conflict of interest under the Act. (See Regulation 18700(b)(3).) There are five kinds of such economic interests:

- A public official has an economic interest in a *business entity* in which he or she has a direct or indirect *investment*<sup>2</sup> of \$1,000 or more (Section 87103(a); Regulation

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<sup>2</sup> An 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.)

18703.1(a)); or in which he or she is a *director, officer, partner, trustee, employee, or holds any position of management* (Section 87103(d); Regulation 18703.1(b));

- A public official has an economic interest in *real property* in which he or she has a direct or indirect interest of \$1,000 or more (Section 87103(b); Regulation 18703.2);
- A public official has an economic interest in any *source of income*, including *promised income*, which aggregates to \$250 or more within 12 months prior to the decision (Section 87103(c); Regulation 18703.3);
- A public official has an economic interest in any *source of gifts* to him or her if the gifts aggregate to \$300 or more within 12 months prior to the decision (Section 87103(e); Regulation 18703.4);
- A public official has an economic interest in his or her personal expenses, income, assets, or liabilities, as well as those of his or her immediate family—this is known as the “personal financial effects” rule (Section 87103; Regulation 18703.5).

## 2. Ms. Cooke.

Ms. Cooke has an economic interest in the real property on which she has her personal residence. (Regulation 18703.2.) You have presented no facts suggesting that she has any other economic interests (*e.g.*, a business entity or a source of income which might depend on a new connection) at-issue in the new connection fee decision.<sup>3</sup>

## 3. Mr. Nielsen.

Mr. Nielsen has an economic interest in his real property. (Regulation 18703.2.) You have presented no facts suggesting that he has any other economic interests (*e.g.*, a business entity or a source of income which might depend on a new connection) at-issue in the new connection fee decision.<sup>4</sup>

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<sup>3</sup> Ms. Cooke also has an economic interest in her personal finances, which are defined to include her personal expenses, income, assets and liabilities (see Regulation 18703.5). We do not consider this economic interest here because any impact on her personal finances from the new connection fee decision will be a derivative consequence of the impact of the decision on her real property. When looking at the effect of a governmental decision on the personal finances of a public official, such as Ms. Cooke, financial effects on real property owned by the official are not considered. (Regulation 18703.5, second sentence.)

<sup>4</sup> As to Mr. Nielsen’s economic interest in his personal finances, see footnote 3, above.

**D. Determining the degree to which the Members' respective properties are involved in the new connection fee decision.**

Once it has been determined that a public official has an economic interest in real property, as the Boardmembers have in their respective properties, the next step in the analysis is determining the degree to which the real property is involved in the governmental decision in question. (Regulation 18700(b)(4).) This step is important because different criteria for evaluating the materiality of the decision's likely financial effect on the real property apply depending upon whether the real property is directly or indirectly involved in the governmental decision.

1. Ms. Cooke.

The Commission's regulations provide that real property is *directly involved* in a governmental decision when (among other things) the decision involves the imposition, repeal or modification of any fees assessed or imposed on the property. (Regulation 18704.2(a)(3).)

Ms. Cooke has formally applied for a new connection for her residential property. Moreover, she seeks that new connection to serve development of her property (construction of the second residence) which is either underway or in active planning. If her application is approved, the impact of the District's decision about connection fees on her property is direct and unambiguous. Her situation falls within Regulation 18704.2(a)(3), and her real property is considered directly involved in the decision.

2. Mr. Nielsen.

In contrast to Ms. Cooke's situation, Mr. Nielsen has not formally applied, nor has he expressed an interest in applying for a new connection.<sup>5</sup> Thus, his real property is not directly involved in the new connection fee decision under Regulation 18704.2(a), and is considered indirectly involved in the decision.<sup>6</sup> (Regulation 18704.2(b).)

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<sup>5</sup> The Commission does not act as a finder of fact when it renders advice. This advice is applicable and confers immunity (see Section 83114) only to the extent that the facts provided to us are correct, and that all of the material facts have been disclosed. (*In re Oglesby* (1975) 1 FPPC Ops. 71, 77.)

<sup>6</sup> In the *Ennis* Advice Letter, No. A-93-341, we advised a member of the board of directors of a county water district who owned an interest in a five-acre property in the district. This property was undeveloped, but served by a water meter. The only legal impediment to its development was the issuance of a "fire flow certificate." However, the district had imposed a moratorium on the issuance of such certificates. We advised this public official that he had a conflict of interest in a district decision about lifting the moratorium on the issuance of fire flow certificates. His property was considered directly involved in the decision to lift the moratorium, just as Ms. Cooke's property is considered directly involved here. In the *Ennis* Advice Letter, and in Ms. Cooke's case, the property was either in present development or would soon be in development, and the decision in-question moved that development forward. By contrast, in Mr. Nielsen's case, you present no facts indicating that the decision about the new connection fee structure will necessarily further present development of the property.

**E. Determining the appropriate standard for judging whether the likely effect of the decision will be material.**

Knowing the degree to which the Boardmembers' respective economic interests, that is, their respective properties, are involved in the new connection fee decision, we can pick the appropriate standard for evaluating the "materiality"—this is, the importance—of the likely effect of the decision on the economic interests. (See Regulation 18700(b)(5).) Only those reasonably foreseeable financial effects which are important enough to be considered material give rise to conflicts of interest.

1. Ms. Cooke.

Since Ms. Cooke's residence is directly involved in the decision, the appropriate materiality standard is found in Regulation 18705.2(a). It provides that *any* reasonably foreseeable financial effect from the new connection fee decision on her property—even a penny's worth—will be considered material.

2. Mr. Nielsen.

Mr. Nielsen's residence is indirectly involved in the new connection fee decision. The materiality standards for indirectly involved real property interests usually vary according to how far the public official's property is from the property which is the subject of the decision. Here, of course, no one property is the sole subject of the decision, so distance is irrelevant. Therefore, the rule in Regulation 18705.2(b)(3) applies. This regulation provides that the financial effect of the new connection fee decision on Mr. Nielsen's property will be deemed material if it is reasonably foreseeable that either of the following will happen as a result of the decision:

- The fair market value of the real property will increase or decrease by \$10,000 or more;
- or
- The rental value of the property will increase or decrease by \$1,000 or more per twelve-month period.

**F. Using the materiality standards to decide a material financial effect is reasonably foreseeable.**

With the appropriate materiality standards in mind, we can frame the important question: Is it *reasonably foreseeable* that the new connection fee decision will have a *material* financial effect on either Ms. Cooke's or Mr. Nielsen's residence? (Regulation 18700(b)(6).)

As used here, "reasonably foreseeable" means "substantially likely." (Regulation 18706; *In re Thorner* (1975) 1 FPPC Ops. 198.) Whether the financial consequences of a governmental

decision are substantially likely at the time the decision is made is highly situation-specific; making this evaluation is a “judgment call.” A financial effect need not be a certainty to be considered reasonably foreseeable; a substantial likelihood that it will occur suffices to meet the standard. On the other hand, if an effect is only a mere possibility, it is not reasonably foreseeable. (*Ibid.*)

#### 1. Ms. Cooke.

In the specific terms of Ms. Cooke’s situation, the important question is whether it is reasonably foreseeable that the new connection fee decision will have any financial effect—even a penny’s worth—on her residence. If the answer is yes, then she has a conflict of interest, unless the public generally exception applies. (Regulations 18705.2(a), 18706.)

Ms. Cooke has formally applied for a new connection. It is reasonably foreseeable that a decision to set the new connection fee will have at least some financial effect on her residence because she will have to pay the fee if her application is approved. Therefore, Ms. Cooke has a conflict of interest in the new connection fee decision, unless the public generally exception applies. (Regulation 18706.)

#### 2. Mr. Nielsen.

In specific terms of Mr. Nielsen’s situation, the question is this: Is it substantially likely that the new connection fee decision will increase or decrease the fair market value of the real property by \$10,000 or more, or will increase or decrease the rental value of the property by \$1,000 or more per twelve-month period? Note that the question is not just whether it is reasonably foreseeable that Mr. Nielsen will apply for a new connection. The question is whether it is substantially likely that the decision will have the required financial impact on his property.

Mr. Nielsen’s property is undeveloped and is not currently served by a District water connection. We assume that the property cannot be meaningfully developed without some kind of water service. The fair market value of the property (one of the relevant materiality standards) depends on whether and how it might be developed. If there is no other means of obtaining water service to the property besides a new connection from the District, then the new connection fee seems to have at least some financial implications for the property. That is, a relatively lower new connection fee would seem to enhance the value of the property by making eventual development relatively more feasible, whereas a relatively higher new connection fee would seem to decrease the value of the property by making eventual development relatively less feasible. We have no information about land values in the District, nor about the specific financial impact on land value from having or not having water service from the District.

Of course, a new connection from the District may not be the only means of obtaining water service to the property—Mr. Nielsen may, for example, be able to dig a well. We have no facts about whether a well is feasible, or, if so, the cost of a well relative to the cost of a new District connection.

As the considerations discussed in the preceding paragraph demonstrate, this is an essentially *factual*, not *legal*, question. These considerations, and perhaps others of which you and Mr. Nielsen may be more aware than are we, must be taken into account. We are unable to conclusively resolve this question from a distance. Having narrowed the question to its critical form, we must leave it to Mr. Nielsen to make the final determination. If he concludes that it is substantially likely that the new connection fee decision will increase or decrease the fair market value of his property by \$10,000 or increase or decrease the fair market rental value by \$1,000 in any twelve-month period, then he has a conflict of interest, unless the public generally exception applies.

#### **G. The “public generally exception.”**

Even if Ms. Cooke and/or Mr. Nielsen otherwise has a conflict of interest, he and/or she may still be able to take a role in the new connection fee decision. If the reasonably foreseeable material financial effect of the decision on his or her real property is *indistinguishable* “from its effect on the public generally,” then he or she does not have a conflict. (Section 87103; Regulations 18700(b)(7), 18707(a).) This rule is referred to as the “public generally exception.” This exception exists because a public official is less likely to be biased by a financial impact on his or her economic interests when a significant part of the community is substantially likely to feel essentially the same impact from the governmental decision.

Generally, the reasonably foreseeable material financial effect on a public official’s financial interest is *indistinguishable* from the effect on the public generally if it is also reasonably foreseeable that the decision will affect a “significant segment” of the public “in substantially the same manner” it will affect the public official’s economic interest. (Regulation 18707(b)(1),(2).) In general terms, applying the public generally exception requires two closely interrelated judgments. Using rules found in the FPPC’s regulations, one must determine whether there is a “significant segment” of the public which is likely to be affected by the governmental decision in “substantially the same manner” as is the economic interest which is potentially creating the conflict. There are also “special purpose” versions of the public generally exception which may apply in special factual situations. (See Regulations 18707.1 - 18707.6.)

### 1. Ms. Cooke.

As it applies to Ms. Cooke's situation, a "significant segment" may be comprised of:

- 10 percent or more of the population in the jurisdiction of the official's agency. (Regulation 18707(b)(1)(A)(i).)
- 10 percent or more of all property owners, all home owners or all households in the jurisdiction of the official's agency. (Regulation 18707(b)(1)(A)(ii).)
- At least 5,000 individuals who are residents of the jurisdiction. (Regulation 18707(b)(1)(C).)

Thus, if enough of the population, property owners, home owners, or households, respectively, are affected by the new connection fee decision in substantially the same manner as is Ms. Cooke and her property, then the public generally exception would apply. This does not appear to be the case. As stated above, the fact that Ms. Cooke has formally applied for a new connection is crucial. This being so, a significant segment of the District would have to be affected by the new connection fee decision in substantially the same manner as a formal applicant for a new connection. As there are only four or five such applicants, we must conclude that the public generally exception does not apply in Ms. Cooke's case.<sup>7</sup> Therefore, we advise that she is disqualified from District decisions about the new connection fees.

### 2. Mr. Nielsen.

If Mr. Nielsen concludes that it is reasonably foreseeable that the new connection fee decision will have a material financial effect on his property (see part IV.F.2, above), he must consider whether the public generally exception applies to him. As observed above, the fact that Mr. Nielsen's property is undeveloped and without present District water service is very important. Thus, the question here is whether a significant segment (see Regulation 18707(b)(1)) of the District is affected by the new connection fee decision in substantially the same manner as is he, as the owner of undeveloped property without District water service. Again, we do not have enough facts to answer this question from a distance.

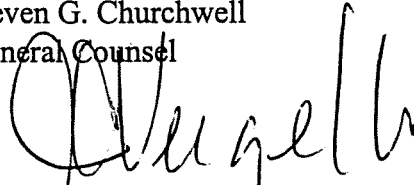
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<sup>7</sup> There is also a special version of the public generally exception which may apply when a water district sets rates and assessments which apply "on a proportional or 'across-the-board' basis on the official's economic interests and a significant segment of the property owners or other persons receiving services from the official's agency using the thresholds" referred to above. (Regulation 18707.1(c).) To understand why this exception does not apply to Ms. Cooke's situation, contrast the present decision with a decision to set new standard rates for water delivered to properties in the District. The latter decision would probably fall within the Regulation 18707.1(c) exception because the effect of the decision falls "across-the-board" on all users. By contrast, many of the users of District services may be unwilling or unable to apply for new connections (*e.g.*, because they cannot subdivide or further develop their property under existing zoning restrictions). Thus, even though all District users are *possible* applicants for a new connection (in a logical sense), this possibility is too remote to support application of Regulation 18707.1(c) here.

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, appearing to read "J. Vergelli", written over the printed name of John Vergelli.

By: John Vergelli  
Staff Counsel, Legal Division

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