



FAIR POLITICAL PRACTICES COMMISSION

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March 8, 2000

Leslie S. Bowker
2017 Andre Avenue
Los Osos, California 93402

Re: Your Request for Advice
Our File No. A-00-027

Dear Mr. Bowker:

This letter is in response to your request for advice regarding the provisions of the Political Reform Act (the "Act").¹

QUESTION

May you participate in Central Regional Water Quality Control Board decisions concerning the Los Osos Wastewater Project?

CONCLUSION

Unless there will be *no* financial effect on your real property interest, you may not participate in decisions concerning the Los Osos Wastewater Project ("project") because the project will result in new or substantially improved sewer services for your real property interest. It does not appear that the "public generally" exception would apply in this circumstance.

FACTS

You have been appointed by Governor Davis to serve on the Region 3 Central Coast Regional Water Quality Control Board ("RWQCB"). The community in which you live is in the process of planning for the collection, treatment and disposal of wastewater. A building moratorium has been in place since 1988. The RWQCB is one of the agencies involved in permitting the project.

¹ Government Code sections 81000 - 91015. Commission regulations appear at title 2, sections 18109 - 18996, of the California Code of Regulations.

You and your wife own your home, and also have a 20 percent interest in your mother-in-law's home. Your wife, Rosemary Bowker, is serving as president of the Los Osos Community Services District ("district"), which has the responsibility for the wastewater project.²

The wastewater project will be providing sewer services to residents who live within the so-called "prohibition area" within the district. You stated that your personal residence is outside of the prohibition area, but that your mother-in-law's home is within the prohibition area. Your personal residence is more than 300, but less than 2,500, feet from the nearest boundary of the prohibition area. You estimated that there are approximately 17,000 residents in Los Osos and that approximately 70 percent of those residents are within the prohibition area.

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.

1. Are you a public official?

The conflict of interest provisions of the Act apply only to "public officials." A "public official" is defined to include "every member, officer, employee or consultant of a state or local government agency...." (Section 82048.) As a member of the RWQCB, you are a "public official" within the meaning of the Act.

2. Are you making, participating in making, or influencing a governmental decision?

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.)

By voting as a member of the RWQCB, you would be making a governmental decision. (Regulation 18702.1.) Using one's official position to influence a decision includes contacts, appearances before, or otherwise attempting to influence any member, officer, employee, or consultant of one's own agency, in your case, the RWQCB. (Regulation 18702.3(a).)

² You are seeking advice on your own behalf. You mention that your wife is the president of the Los Osos Community Services District. Please note that this advice is limited to your obligations under the Act.

3. What are your economic interests?

The Act's conflict of interest provisions apply only to conflicts arising from *economic* interests. Section 87103 recognizes five kinds of economic interests from which conflicts of interest may arise:

- A business entity in which a public official has a direct or indirect investment³ of \$1,000 or more (Section 87103(a); Regulation 18703.1(a)); or in which a public official is a director, officer, partner, trustee, employee, or holds any position of management. (Section 87103(d); Regulation 18703.1(b).)
- Real property in which a public official has a direct or indirect interest of \$1,000 or more. (Section 87103(b); Regulation 18703.2.)
- Any source of income to the public official which aggregates to \$250 or more within 12 months prior to the decision. (Section 87103(c); Regulation 18703.3.)
- Any source of gifts to the public official if the gifts aggregate to \$300⁴ or more within 12 months prior to the decision. (Section 87103(e); Regulation 18703.4.)
- A public official also 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 sometimes known as the "personal financial effects" rule.) (Section 87103; Regulation 18703.5.)

Based on the facts provided, you have two economic interests that could give rise to a conflict of interest: your personal residence and your mother-in-law's residence in which you own a 20 percent interest.

³ Section 87103 defines an 'indirect investment' or interest as 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.

⁴ The gift limit amount is adjusted biennially by the Commission to reflect changes in the Consumer Price Index. As of January 1, 1999, the amount is \$300. (Section 87103(e); Regulation 18940.2.)

1. Real property - your personal residence

You own your personal residence. We assume for purposes of this letter that your interest in your personal residence is at least \$1,000. Therefore, your personal residence is a real property economic interest of yours. (Section 87103(b).)⁵

2. Real property - your mother-in-law's residence

You have a 20 percent interest in your mother-in-law's residence. Presumably, your interest in your mother-in-law's residence is at least \$1,000. Therefore, your mother-in-law's residence is a real property economic interest of yours. (Section 87103(b).)

3. Your spouse's income from the district is not an economic interest

A public official's income, for purposes of the Act, includes his or her community property interest in the income of his or her spouse. (Section 82030(a).) Generally, a public official's community property interest in his or her spouse's income would be considered income to the public official, and the public official would have an economic interest in the *source* of that income. (*Ibid.*; Section 87103(c).) However, salary and reimbursement for expenses from a state, local, or federal government agency are expressly excluded from the Act's definition of income. (Section 82030(b)(2).)

Accordingly, the income your wife receives as the president of the district does not make the district a source of income to you because of the "government salary" exception. Thus, your community property interest in your wife's income from the district does not present a conflict of interest that would prohibit you from taking part in RWQCB's decisions that affect Region 3.

4. **Are your economic interests directly or indirectly involved in the decision?**

Your personal residence

The Commission's regulations set out specific circumstances where real property is considered "directly involved" in a decision; for example, re-zoning, annexing, selling, purchasing, leasing, assessing, redeveloping or authorizing a specific use of the property. (See generally Regulation 18704.2.) If real property is not directly involved in a decision, it is indirectly involved for purposes of applying the materiality regulations. (Regulation

⁵ When determining whether a governmental decision has a personal financial effect on a public official, a financial effect on the value of real property owned directly or indirectly by the official shall not be considered. (Regulation 18703.5.) While sewer rates may go up or down, this impact is tied to the real property in which you have an investment. Therefore, there would be no personal financial effect.

18704.2(b).) Your personal residence lies outside of the prohibition zone that is the subject of the wastewater project. Thus, your personal residence is deemed to be indirectly involved in the RWQCB's permitting decisions about the project.

Your mother-in-law's residence

Regulation 18704.2(a) prescribes specific rules for determining whether a given real property economic interest is directly involved in a governmental decision. Applying these rules to your real property interest in your mother-in-law's residence in the context of the proposed wastewater project, it appears that the real property is not directly involved in the upcoming decisions about the project. (*Whittier* Advice Letter, No. A-99-256.) Therefore, pursuant to Regulation 18704.2(b), the real property is considered to be indirectly involved in the decisions.

5. What is the applicable materiality standard?

Your personal residence

Regulation 18705.2(b) provides that the financial effect of a decision is material on real property that is between 300 and 2,500 feet of a project if it is reasonably foreseeable that the decisions relating to the project will affect the property's fair market value by \$10,000, or the property's rental value by \$1,000 in a one-year period. (Regulation 18705.2(b)(1)(C).)

Your mother-in-law's residence

Regulation 18705.2(b) also provides that the financial effect of a decision on real property is deemed to be material if the decision involves construction or improvements to streets, water, storm drainage or similar facilities, and will result in new or substantially improved services to the real property. (Regulation 18705.2(b)(1)(B).) Because the wastewater project will result in new or substantially improved services to the sewer system which serves your mother-in-law's residence, the materiality standard in Regulation 18705.2(b)(1)(B) will apply to this economic interest.

6. Is it substantially likely that the governmental decision will result in one or more of the materiality standards being met for one or more of your economic interests?

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. 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.*)

Your personal residence

Based on the facts you have provided, it does not appear that it would be reasonably foreseeable that a decision regarding the wastewater project would have a material financial effect on your personal residence because you are not receiving new sewer facilities.

Your mother-in-law's residence

Since your mother-in-law's residence will receive new or substantially improved sewer services, it is substantially likely that the materiality standards of Regulation 18705.2 will be met.

It is therefore reasonably foreseeable that implementation of a new sewer system will have a financial effect on your mother-in-law's residence.

7. Public Generally Exception

Even if there is a reasonably foreseeable material financial effect on one of your economic interests, you may still participate in the decision if the material financial effect of the decision is *not distinguishable from its effect on the public generally*.⁶ This exception is commonly referred to as the "public generally" exception.

For the public generally exception to apply, the permitting decision must affect your mother-in-law's residence in substantially the same manner as it would affect a significant segment of the public in the jurisdiction of the RWQCB.

Regulation 18707(b) provides that the "public generally" exception applies where both subdivisions (1) and (2) are met:

"(1) Significant Segment: The governmental decision will affect a 'significant segment' of the public generally as set forth below:

(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

⁶ For appointed members of boards and commissions, Regulation 18707.4 creates a narrow exception from disqualification under the Act's conflict of interest laws for members of boards or commissions who, by law, are required to have a particular economic interest to be on the board. From the facts you have provided, this exception would not apply to you.

(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

* * *

(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.

* * *

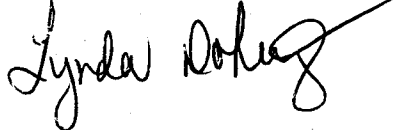
(2) Substantially the Same Manner: The governmental decision will affect the official's economic interest in substantially the same manner as it will affect the significant segment identified in subdivision (b)(1) of this regulation." (Regulation 18707(b), copy enclosed.) (Emphasis added.)

Note the emphasized language in the excerpt. As a member of the RWQCB, your jurisdiction is the RWQCB, not the services district. Thus, for the public generally exception to apply, ten percent or more of the population, property owners, home owners, or households, or 5,000 individuals in the jurisdiction of the RWQCB must be affected by the permitting decision in substantially the same manner as your mother-in-law's residence. Based upon the information I received from the RWQCB, its jurisdiction encompasses approximately one million residents. Therefore, it appears that the exception does not apply.

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

Sincerely,

Luisa Menchaca
Assistant General Counsel



By: Lynda Doherty
Political Reform Consultant, Legal Division

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Enclosure