



FAIR POLITICAL PRACTICES COMMISSION

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April 13, 2000

Kenneth A. Wilson
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555 Fifth Street, Suite 230
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**Re: Your Request for Advice
Our File No. A-00-077**

Dear Mr. Wilson:

This letter is in response to your request for advice on behalf of Planning Commissioner Allen Cohen regarding the provisions of the Political Reform Act (the "Act").¹

QUESTION

May Mr. Cohen participate in planning commission discussions and decisions concerning the adoption of a growth management ordinance (G.M.O.) limiting new development within the city?

CONCLUSION

No. The facts as presented establish Mr. Cohen's property interests will be directly affected by the adoption or non-adoption of the G.M.O. and no exception applies.

FACTS

Allen Cohen is one of five members of the planning commission for the City of Healdsburg (the "city"). The city is considering passage of a Growth Management Ordinance ("GMO") which would limit, subject to certain exceptions, the number of new dwelling units permitted to be constructed within the city each year. The planning commission has been

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

charged with holding public study sessions regarding the GMO, taking public comment, and submitting initial determinations and recommendations concerning adoption of the GMO to the city council for consideration. Specific matters before the planning commission concerning the GMO include the number of units permitted per year and exceptions to the GMO (i.e., affordable housing, subdivisions of four units or less, and remodeling).

Mr. Cohen owns seven acres of land at 1125 North Fitch Mountain Road within the city. Mr. Cohen plans to subdivide the land into four parcels, and build a single-family residence on each parcel for later sale. Mr. Cohen's property is in a RI zoning district. The properties within the City that are deemed "subdividable" into parcels containing four units or less (exempting them from the G.M.O.) are estimated to total 68, as compared with the number of existing single family dwelling units within the City totaling 3,107. Based on this ratio, slightly more than two percent (2.2%) of the property owned within the City is subject to the same considerations relating to the G.M.O. adoption as Mr. Cohen's property.

ANALYSIS

The Act's conflict of interest provisions help to insure that public officials perform their duties impartially, free from bias attributable to their own financial interests or those 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.

A public official has a "financial interest" in a governmental decision, within the meaning of the Act, if it is reasonably foreseeable that the 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 ordered process for determining whether the Act's conflict of interest restrictions apply to a given public official with regard to a particular governmental decision. (Regulation 18700(b).)

Is Mr. Cohen 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 planning commission, Mr. Cohen is a "public official" within the meaning of the Act.

Will Mr. Cohen be participating in a governmental decision?

The Act's conflict of interest provisions come into play only when a public official makes, participates in making, or in some way attempts to use his or her official position to influence a governmental decision in which the official knows — or has reason to know — that

he or she has a financial interest. (Section 87100.) Commission regulations describe in detail what constitutes making, participating in making, or influencing a governmental decision. (Regulations 18702.1, 18702.2, and 18702.3, respectively.) Mr. Cohen clearly will be making, participating in making, or influencing a governmental decision if he participates in a decision to adopt a growth management ordinance limiting new development within the City of Healdsburg.

What are Mr. Cohen's economic interests?

The "economic interests" from which conflicts of interest may arise are described by Section 87103 and Regulations 18703-18703.5. There are six kinds:

- A public official has an economic interest in a *business entity* in which he or she has a direct or indirect *investment*² of \$1,000 or more (Section 87103(a); Regulation 18703.1(a));
- A public official has an economic interest in a *business entity* 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);
- An official has an economic interest in any *source of income*, including promised income, totaling \$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 total \$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).

The request for advice indicates Mr. Cohen owns a 7-acre parcel within the City on which he plans to develop single-family homes. Presumably that real property interest has a value of at least \$1,000. Therefore, it is an economic interest for purposes of the Act.

² 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, or dependent children own directly, indirectly, or beneficially a 10-percent interest or greater. (Section 87103.)

Is Mr. Cohen's economic interest directly or indirectly involved in decisions related to the street closure or the amendment to the general plan?

The next step in analyzing a potential conflict of interest is to determine whether the official's interests are directly or indirectly involved in the governmental decision(s) at issue. (Regulation 18700(b)(4).) Real property is directly involved in a decision if the decision involves, among other things, the sale, purchase, or lease of the property; the issuance, denial or revocation of a license, permit or other land use entitlement authorizing a specific use of that property; or the imposition, repeal, or modification of taxes or fees imposed on the property. (Regulation 18704.2.) Because the decision whether to adopt a growth management ordinance involves issues of land use entitlement, Mr. Cohen's real property is directly involved.

Is it foreseeable that the decision will have the required material financial effect when the materiality standard is applied?

For real property interests directly involved in a decision, the materiality standard is set by Regulation 18705.2, subdivision (a). Any reasonably foreseeable financial effect on real property "in which a public official has an economic interest, and which real property is directly involved in a decision before the official's agency, is deemed material." (Regulation 18705.2, subd.(a).) As the advice request concedes, the planning commission's decision obviously will have a foreseeable financial effect on Mr. Cohen's property insofar as his ability to develop the property is governed by the growth management ordinance. Thus, the planning commission's decision will have a reasonably foreseeable material financial effect on Mr. Cohen's property. Therefore, Mr. Cohen may not participate in the decision unless the "public generally" exception applies.

The "Public Generally" Exception

Although a public official may have a financial interest in a decision, the official may still participate in the decision if the material financial effect of the decision is not distinguishable from the effect on the public generally. (Section 87103.) This exception is commonly referred to as the "public generally" exception. The exception will apply if the decision will affect a "significant segment" of the public "in substantially the same manner" as it affects the public official. (Regulation 18707, subd.(b).)

"Significant segment" is defined in Regulation 18707, subdivision (b)(1):

"(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

(ii) Ten percent or more of all property owners, all homeowners, or all households in the jurisdiction of the official's agency or the district the official represents, or

(B) For decisions that affect a business entity in which the official has an economic interest, fifty percent of all businesses in the jurisdiction or the district the official represents, so long as the segment is composed of persons other than a single industry, trade, or profession; 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; or,

(D) The decision will affect a segment of the population which does not meet any of the standards in subdivisions (b)(1)(A) through (b)(1)(C), however, due to exceptional circumstances regarding the decision, it is determined such segment constitutes a significant segment of the public generally."

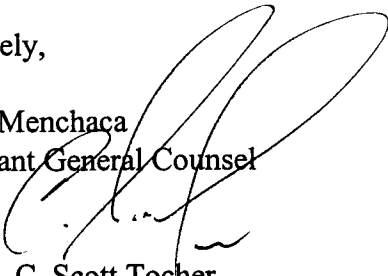
"Substantially the Same Manner" is defined as a governmental decision which will "affect the official's economic interest in substantially the same manner as it will affect the significant segment identified in subdivision (b)(1) of this regulation." (Regulation 18707, subd.(b)(2).)

Mr. Cohen cannot meet the thresholds listed above. As indicated in the advice request, only two percent (68 parcels) of the subdividable parcels in the City are subject to the same considerations relating to the G.M.O. adoption as Mr. Cohen's property. Thus, it cannot be said that a "significant segment" of the public will be affected. Moreover, it does not appear that Mr. Cohen's interests will be affected in "substantially the same manner" as the other homeowners. Therefore, the "public generally" 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: 
C. Scott Tocher
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