



FAIR POLITICAL PRACTICES COMMISSION

428 J Street • Suite 620 • Sacramento, CA 95814-2329

(916) 322-5660 • Fax (916) 322-0886

June 3, 2003

Robert Westmeyer, County Counsel
Office of the County Counsel
Napa County
1195 Third Street, Room 301
Napa, CA 94559

**Re: Your Request for Informal Assistance
Our File No. I-03-003**

Dear Mr. Westmeyer:

This letter is in response to your request for advice on behalf of Diane Dillon, regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").¹ Since you have not provided enough facts to complete our analysis, we can offer only informal assistance.²

QUESTION

May Supervisor Dillon participate in the Napa County Board of Supervisors' decisions concerning the Stream Set-Back Ordinance Referendum ("Referendum") by applying the "public generally" exception, assuming that she has a conflict of interest in the decision?

CONCLUSION

Supervisor Dillon may not participate in the Napa County Board of Supervisors' decisions concerning the Referendum unless a significant segment of the county's

¹ Government Code sections 81000 – 91014. Commission regulations appear at Title 2, sections 18109-18997, of the California Code of Regulations.

² Informal assistance does not provide the official with the immunity conferred by formal written advice. (Regulation 18329(c)(3), copy enclosed.)

population is affected in substantially the same manner as the official's economic interests (as discussed below).

FACTS

Diane Dillon is a member of the Napa County Board of Supervisors ("Board"). The Board is presently considering a Referendum regarding the recently passed Stream Setback Ordinance ("Ordinance"). The Ordinance significantly increases the setbacks from rivers, creeks and streams for most non-residential improvements to real property located in the unincorporated area of Napa County. Now, the Referendum requires the Board to either revoke the Ordinance or place the issue on the ballot for a public vote.

Because the Ordinance proposes to make changes in the zoning regulations of the county, the Napa County Conservation, Development and Planning Commission ("Planning Commission") conducted a series of public hearings on the Ordinance as required by law and has forwarded its recommendation to the Board. The Ordinance is an amendment to the existing countywide zoning plan and not a plan to zone or rezone a specific part of the jurisdiction.

There are three different classes of rivers, creeks and streams included in the Ordinance: Class 1, 2 and 3. Within each class, the proposed setback varies depending on the slope of the embankment. The classes of the streams for most of the properties in the jurisdiction are not identified on any known map. Classes of streams on those parcels must therefore be established by on-site physical inspections and the determination of the proper setback must also be decided on-site at each property. Usually, Class 1 streams have the greatest setbacks and Class 3 streams have the smallest. The Ordinance exempts residential uses from this setback change. This Ordinance only affects lots not previously zoned for residential use.

There are 15,719 parcels in the unincorporated area of the county according to the Napa County Assessor. The Planning Commission concluded, based on a review of GIS mapping of the county, that under the Ordinance at least 9,700 (61%) of these parcels would be affected by the expanded setbacks proposed.

The Napa County Assessor advised that the number of parcels in the unincorporated area owned by more than one individual is roughly 60-65%. The number of parcels held by the same owner is approximately 4,000. The Assessor then took the percentage of parcels held by individuals and used that percentage against the number of parcels affected, to determine the number of individuals affected by the Ordinance.³ The number of individuals affected is 11,500 (mostly Napa County residents).

Supervisor Dillon lives within the City of St. Helena. Neither Ms. Dillon nor her spouse own any real property in the unincorporated area. Supervisor Dillon was a partner in the law firm of Coombs & Dunlap, LLP, during all of the calendar year 2002. Coombs

³ (4,000/15,719 = 25% (approx.) - percent of multiple ownership) and 75% x 9,600 = 7,200 (number of parcels owned by single individuals).

& Dunlap has offices in the cities of Napa and St. Helena. During 2002, Supervisor Dillon had a 14% interest in Coombs & Dunlap. Although Supervisor Dillon's practice is somewhat specialized, Coombs & Dunlap serves a broad range of clients in the unincorporated area of the County of Napa including individuals proposing to establish new wineries, expand existing wineries, as well as grape growers who wish to plant new vineyards, expand existing vineyards or remove and replant existing vineyards that are no longer productive due to old age or disease.

Supervisor Dillon resigned from Coombs & Dunlap effective December 31, 2002, and terminated all of her financial interests in the firm by January 16, 2002. Supervisor Dillon's spouse is the sole owner of a real estate brokerage agency in the City of St. Helena and derives income from the sale of properties often located in the unincorporated area of the County of Napa. For purposes of this advice letter it is assumed that Supervisor Dillon's community property interest in such brokerage fees that were earned in the prior months will always total or exceed \$500 regardless of the point in time being considered.⁴

The Ordinance applies to all the properties in the unincorporated areas of the county (excluding personal residences). Supervisor Dillon's former law firm is located in the incorporated areas of the City of Napa and the City of St. Helena. Supervisor Dillon's husband's business is located in the incorporated area of the City of St. Helena. Supervisor Dillon has over 50 economic interests as a result of law firm interest and those 50 people own between 50 and 70 parcels that could be included in the scope of the Ordinance.

Supervisor Dillon did not participate in the vote when the Board considered the Ordinance. She is seeking advice from the Commission regarding her participation in the Referendum regarding the Ordinance. Specifically, you asked on behalf of Supervisor Dillon for us to assume that she has a conflict of interest and apply only the "public generally" exception. After many discussions, messages, and letters from Commission staff attempting to obtain the information necessary to complete the analysis bearing on which properties are impacted by the ordinance in substantially the same manner, Supervisor Dillon has determined that she will not be able to acquire the necessary information to apply the exception and a vote on the Referendum is set for June 3, 2003. Supervisor Dillon estimates that this process could take days or even weeks and, at one point, thought that six months would be a reasonable time estimate for obtaining the information. At this time, Supervisor Dillon has knowledge of the streams on "some" of the properties.⁵

⁴ In a previous letter to Supervisor Dillon, advice was provided regarding these economic interests. (*Dillon Advice Letter, No. I-02-082.*)

⁵ Supervisor Dillon believes that by providing information regarding the properties in the unincorporated area she would be revealing privileged information of the law firm's clients. Supervisor Dillon does not explain whether this information is obtainable from other means, such as the county.

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. A public official has a "financial interest" in a governmental decision, within the meaning of the Act, when 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 determining whether the Act's conflict-of-interest restrictions apply to a given individual with regard to a specific governmental decision. (Regulation 18700(b).)⁶ Specifically, Supervisor Dillon asks if the seventh step, the "public generally" exception, applies, which would then allow her to vote on the Referendum despite her financial interests.⁷

Under the "public generally" exception, an official may still participate in a decision if the financial effect of the decision on the official's economic interest is indistinguishable from the decision's effect on the public generally. (Section 87103; regulation 18707(a).) This "public generally" exception is codified in regulations 18707 - 18707.9. Pursuant to these provisions, if a "significant segment" of the jurisdiction is affected by the governmental decision in substantially the same manner as it would affect the official's economic interests, then the official may participate in the decision.

Regulation 18707(b), summarized below, describes the steps used to apply the "public generally" exception:

- (1) Identify each economic interest that is materially affected by the governmental decision.
- (2) Determine the applicable "significant segment" rule for each economic interest identified in Step One.
- (3) Determine if the significant segment is affected by the governmental decision as set forth in the applicable "significant segment" rule.

⁶ The standard eight-step process includes: (1) Public official?; (2) "Making," "participating in making," or "influencing" a governmental decision?; (3) Economic interests?; (4) Are they directly or indirectly involved?; (5) Are they materially affected?; (6) Is it reasonably foreseeable?; (7) Does it effect the public generally the same way? and (8) Is participation legally required? (Regulation 18700.) This process is presented in more detail in the pamphlet, "Can I Vote? Conflicts of Interest Overview" (copy enclosed).

⁷ You asked that we assume that Supervisor Dillon has a conflict of interest as a result of her economic interests and apply only the "public generally" exception. However, during multiple telephone conversations we have advised you that through the application of the first six steps of the Eight-Step Conflict-of-Interest Process, many of Supervisor Dillon's economic interests may not even meet the materiality threshold.

(4) Determine if the economic interest identified in Step One is affected by the governmental decision in “substantially the same manner” as other economic interests in the applicable significant segment.

Regulation 18707.1 contains the requirements for steps 2, 3 and 4 above, which include:

“(a) Except as provided in Government Code sections 87102.6 and 87103.5, the material financial effect of a governmental decision on a public official’s economic interests is indistinguishable from its effect on the public generally if both subdivisions (b)(1) and (b)(2) of this regulation apply.

“(b) Significant Segments and Indistinguishable Effects.

“(1) Significant Segment. The governmental decision will affect a ‘significant segment’ of the public generally if any of the following are affected as set forth below:

“(A) Individuals. For decisions that affect the personal expenses, income, assets, or liabilities of a public official or a member of his or her immediate family, or that affect an individual who is a source of income or a source of gifts to a public official, the decision also affects:

“(i) Ten percent or more of the population in the jurisdiction of the official’s agency or the district the official represents; or

“(ii) 5,000 individuals who are residents of the jurisdiction.

“(B) Real Property. For decisions that affect a public official’s real property interest, the decision also affects:

“(i) Ten percent or more of all property owners or all homeowners in the jurisdiction of the official’s agency or the district the official represents; or

“(ii) 5,000 property owners or homeowners in the jurisdiction of the official’s agency.

“(C) Business Entities. For decisions that affect a business entity in which a public official has an economic

interest the decision also affects 2,000 or twenty-five percent of all business entities in the jurisdiction or the district the official represents, so long as the effect is on persons composed of more than a single industry, trade, or profession. For purposes of this subdivision, a not for profit entity other than a governmental entity is treated as a business entity.

¶...¶

“(2) Substantially the Same Manner: The governmental decision will affect a public official’s economic interest in substantially the same manner as it will affect the significant segment identified in subdivision (b)(1) of this regulation.”

Significant Segment

The facts provided ask us to assume that Supervisor Dillon has a conflict of interest from the economic interests provided. These include, as discussed in the prior advice letter, *Dillon, supra*, income received in the past 12 months from her former law firm and its clients, a business investment interest in her husband’s business as well as the income received from the business and its clients, in addition to her real property interest in her personal residence. Even though Supervisor Dillon’s personal residence is an economic interest of hers, since the Referendum encompasses only the unincorporated area and excludes personal residences due to an amendment to the Ordinance made after the initial advice letter request, her residence would not be impacted by the decision. Therefore, Supervisor Dillon’s personal residence will not be analyzed further.

1) Source of Income (18707.1(b)(1)(A)) – Clients of Former Law Firm & Husband’s Business

Regulation 18707.1(b)(1)(A) is the standard used when the decision affects a public official’s source of income. As stated above, to qualify as a significant segment under regulation 18707.1(b)(1)(A), the decision has to also affect 10% “or more of the population in the jurisdiction of the official’s agency or the district the official represents; or (ii) 5,000 individuals who are residents of the jurisdiction.”

According to the facts you provided, 11,500 individuals will be affected by the decision and since this number is greater than the required 5,000 individuals, the decision also affects a significant segment of the jurisdiction.

2) Business Interest - (18707.1(b)(1)(C)) – Husband’s Business

Regulation 18707.1(b)(1)(C), as discussed above, is the standard used when the decision affects an official’s business interest. To qualify as a significant segment under

regulation 18707.1(b)(1)(C), the decision has to also affect “2,000 or twenty-five percent of all business entities in the jurisdiction or the district the official represents, so long as the effect is on persons composed of more than a single industry, trade, or profession.”

You have not provided facts regarding the number of businesses in the jurisdiction or the number that may be affected by the decision. Therefore, we cannot analyze this economic interest. However, please note as discussed earlier, Supervisor Dillon’s husband’s business may not even be materially affected by the decision. The business interest public generally test may not even be necessary if the conflict-of-interest rules are applied.⁸

Substantially the Same Manner

After determining that a significant segment will be affected by a decision, it is next necessary to evaluate if the *public official’s economic interest* will be affected in substantially the same manner as the rest of the segment. If the answer is “yes” as to each economic interest identified, then the effect of the decision is not distinguishable from the effect on the public generally and the public official may participate in the decision. (Regulation 18707(b)(4).) To assess whether a significant segment will be affected in substantially the same manner, all measurable effects from the decision must be identified.

Although you have provided some facts which have been used to determine the appropriate significant segments, the facts necessary to enable us to determine whether the effects on Supervisor Dillon’s sources of income within the Referendum area are substantially the same as the effects on the public generally have not been provided. Information relevant to this would be the number of properties with Class 1 streams, Class 2 streams, and/or Class 3 streams on them. This is necessary since the stream setbacks changes are so varied based on what class of stream runs through the property. The “public generally” exception requires comparison of the financial effects on Supervisor Dillon’s sources of income to the financial effects of a significant segment of the public generally. If these economic interests are effected in substantially the same manner as a significant segment, could the exception apply.⁹ Since you have not provided that information, we cannot apply the analysis.

When making this determination, Supervisor Dillon must make a good faith effort to assess the impact of the decision on all of her economic interests. The Commission does not act as a finder of fact when it renders advice (*In re Oglesby* (1975) 1 FPPC Ops. 71, 77), and also cannot provide formal advice without sufficient facts (regulation 18329(b)(2)(B)). The analysis requires that there be at least a reasonable, good faith

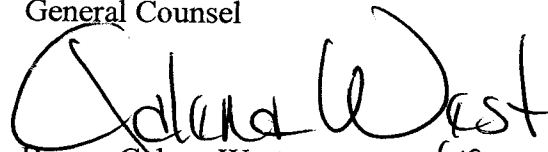

⁸ Since we do not have enough information to apply the first prong of the “public generally” test, we will not proceed to analyze the second prong for this economic interest.

⁹ For example, if one of her sources of income has an unusually large parcel within the unincorporated area or more streams or higher setbacks than the others affected, then they would not be affected in “substantially the same manner” as everyone else. These are only examples of the kinds of effects that would not be considered to be “substantially the same.”

showing of the common impact of the particular governmental decision. (*Stornetta*
Advice Letter, No. I-91-183; *Green* Advice Letter, No. A-90-075.)

Sincerely,

Luisa Menchaca
General Counsel


By: Galena West
Counsel, Legal Division 

Enclosures

GW:jg

I:\AdviceLtrs\I-03-003