



FAIR POLITICAL PRACTICES COMMISSION

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June 10, 2003

Mario Biagi, Supervisor
Amador County Board of Supervisors
John C. Begovich Building
500 Argonaut Lane
Jackson, CA 95642

Re: Your Request for Informal Assistance
Our File No. I-03-010

Dear Mr. Biagi:

This letter is in response to your request for advice regarding the conflict of interest provisions of the Political Reform Act (the "Act").¹ We are providing you with informal assistance² since we do not have all material facts necessary to issue formal advice. (See regulation 18329(b)(8)(C).)

QUESTION

May you, a county supervisor who is also a wine grape grower, participate in a vote regarding a proposed change to the county's winery ordinance that would allow on-site fresh food service in winery tasting room areas?

CONCLUSION

Adoption of the proposed change to the winery ordinance will not have a reasonably foreseeable material financial effect on your wine grape growing business. Therefore, you do not have a disqualifying conflict of interest based on your business.

However, if adoption of the proposed change to the winery ordinance would have a reasonably foreseeable material financial effect on Renwood Winery, the winery to which you contract to sell your grapes, then you have a disqualifying conflict of interest

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

² Only formal written advice confers immunity provided under section 83114(b) and regulation 18329(b)(7). Informal assistance does not provide immunity. (Regulation 18329(c)(3), copy enclosed.)

and you may not participate in the vote regarding the proposed ordinance change. You must make this determination after applying the appropriate materiality standard, as described below.

FACTS

You are the supervisor for Amador County, District 5, which encompasses most of the wine industry area of your county in the Shenandoah Valley near the City of Plymouth. There is an issue before the Amador Planning Commission, which will ultimately come before the board of supervisors for a vote. The issue involves a proposed change in the county's winery ordinance, which would allow on-site fresh food services, i.e. restaurants, barbecues, delicatessens, etc. in wine tasting rooms.

Your concern is that as a wine grape grower, you sell your grapes to one of the local wineries in the Shenandoah Valley located in your district. Renwood Winery, the winery to which you sell your grapes may, in the future, have food service if the ordinance is changed. You have several years remaining on your contract with Renwood Winery, and may or may not continue with this winery in the future.

In a telephone conversation with Commission staff on April 15, 2003, you confirmed that neither you nor Renwood Winery initiated the proposed change to the winery ordinance. In a further telephone conversation on June 2, 2003, you stated that you have 9 acres of wine grapes and that your net income from your grapes in the last fiscal year was less than \$500,000, and that your earnings before taxes was less than \$750,000. You further stated that the board of supervisors' decision on the proposed change to the winery ordinance would not result in an increase or decrease to your business entity's gross income of \$20,000 or more, an increase or decrease in the value of the business entity's assets or liabilities of \$20,000 or more, or in the business entity incurring or avoiding additional expenses or reducing or eliminating existing expenses of \$5,000 or more for a fiscal year. This is because the income or expenses to your business are affected more by external factors such as the current glut of grapes in the valley and the cost of labor to pick the grapes, than factors such as the proposed change to the winery ordinance. Therefore, it is your opinion that regardless of whether or not the ordinance is amended to allow food service, you will have neither financial gain nor loss.

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 financial interests. (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. Determining whether you have a conflict of interest based on the facts you presented requires an eight-step analysis.

Step One: Is the individual a “public official”?

Under the Act, a “public official” is defined, in part, as a “member, officer, employee or consultant of a state or local government agency.” (Section 82048.) As a member of the Amador County Board of Supervisors, you are a public official.

Step Two: Is the public official “making,” “participating in making” or “influencing” a governmental decision?

The Act’s conflict of interest provisions apply only to disqualify a public official from “making,” “participating in making,” or “influencing” a governmental decision. If the determination is made that the public official is not engaging in any of these actions, then the conflict of interest rules are not implicated and the analysis ends. Therefore, the threshold question in any analysis is whether the public official is “making,” “participating in making,” or “influencing” a governmental decision. Since your question asks whether you may participate in a vote regarding a proposed change in the county’s winery ordinance, we will consider this step fulfilled.

Step Three: What are the public official’s economic interests?

Section 87103 provides that a public official has a “financial interest” in a governmental decision “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 any of the official’s economic interests. There are six possible economic interests:

1. A public official has an economic interest in a business entity in which he or she has a direct or indirect investment³ of \$2,000 or more (section 87103(a); regulation 18703.1(a));
2. A public official has an economic interest 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));
3. A public official has an economic interest in real property in which he or she has a direct or indirect interest of \$2,000 or more (section 87103(b); regulation 18703.2);
4. A public official has an economic interest in any source of income, including promised income, which aggregates to \$500 or more within 12 months prior to the decision (section 87103(c); regulation 18703.3);

³ 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.)

5. A public official has an economic interest in any source of gifts to him or her if the gifts aggregate to \$340 or more within 12 months prior to the decision (section 87103(e); regulation 18703.4);
6. 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).

We have assumed for purposes of this letter that your contract with Renwood Winery provides income equal to or in excess of \$500 or more within 12 months. Therefore, Renwood Winery is a source of income to you, and you have an economic interest in that source of income. (Regulation 18703.3.) You also have an economic interest in your own business entity. (Regulation 18703.1.)

Step Four: Are the public official's economic interests directly or indirectly involved in the governmental decision?

The next step is to determine whether the economic interests will be involved directly or indirectly in the decision. (Regulation 18700(b)(4).) A person, including a business entity or source of income, is directly involved in a decision before an official's agency when that person, either directly or by an agent:

"(1) Initiates the proceeding in which the decision will be made by filing an application, claim, appeal, or similar request or;

"(2) Is a named party in, or is the subject of, the proceeding concerning the decision before the official or the official's agency. A person is the subject of a proceeding if a decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the subject person." (Regulation 18704.1(a).)

Under the Commission's regulations, business entities and sources of income which are not directly involved under the rules stated above are considered indirectly involved for purposes of determining the appropriate materiality standard. (Regulation 18704.1(b).) Neither you nor Renwood Winery is the applicant or initiator of the proposed change to the winery ordinance. Both of these economic interests are then considered indirectly involved in the proposed governmental decision and the materiality standard of regulations 18705.1(c) and 18705.3(b) are applicable.

Steps Five and Six: What are the applicable materiality standards and will it be reasonably foreseeable that the materiality standards will be met?

First, regulation 18705 is applied to define the standards to be used when determining whether a financial effect of an economic interest is material. For those that

are indirectly involved, regulation 18705.1(c) gives materiality standards for finding a financial effect on business entities and regulation 18705.3(b) gives the standards for sources of income. (Copies enclosed.)

Based on the gross revenues of your business, your business falls within the materiality standard set forth at regulation 18705.1(c)(4), which states:

“(4) If the business entity is not covered by subdivisions (c)(1)-(3), the financial effect of a governmental decision on the business entity is material if it is reasonably foreseeable that:

“(A) The governmental decision will result in an increase or decrease in the business entity's gross revenues for a fiscal year in the amount of \$20,000 or more; or,

“(B) The governmental 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 \$5,000 or more; or,

“(C) The governmental decision will result in an increase or decrease in the value of the business entity's assets or liabilities of \$20,000 or more.”

Next, the public official must evaluate whether it is reasonably foreseeable that the decision will have a material financial effect on any of those economic interests by ascertaining the applicable materiality standard. (Regulations 18700(b)(5), 18705-18705.5, 18706.) An effect of a decision is reasonably foreseeable 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; *Harper Advice Letter*, No. A-96-298.)⁴

You have stated that it is not reasonably foreseeable that any of these materiality standards will be met because the income or expenses to your business are affected more by external factors such as the current glut of grapes in the valley and the cost of labor to pick the grapes, than factors such as the proposed change to the winery ordinance. Therefore, according to the facts as you have stated them, it is not reasonably foreseeable

⁴ Recently, the Legislature amended the Act with new section 87105. This section imposes certain public disclosure obligations upon public officials who are identified as such in section 87200 of the Act (which includes city council members) when they have a disqualifying conflict of interest. Additionally, under these circumstances, this section generally requires that an official leave the room until after the discussion, vote, and any other disposition of the matter giving rise to the disqualification is concluded. The Commission recently adopted new regulation 18702.5 (copy enclosed) that outlines the obligations of public officials arising under section 87105 of the Act.

that the decision on the winery ordinance will have a material financial effect on your wine grape growing business.

Since Renwood Winery is an indirectly involved source of income, regulation 18705.3(b)(1) applies. This regulation, however, cross-references to the same standards applied in the business entity analysis above. We do not have the financial information concerning the winery to complete this analysis. However, if it meets the materiality standards set forth in regulation 18705.1(c), then you must go on to Step Six, and determine whether it is reasonably foreseeable that that standard will be met.

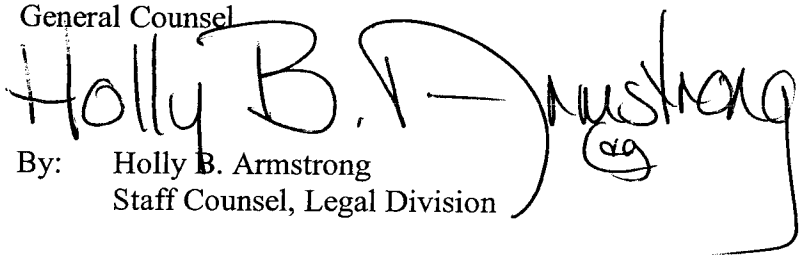
Steps Seven and Eight: "Public Generally" and "Legally Required Participation" Exceptions

Step seven is an exception that applies where the reasonably foreseeable and material financial effect on the official's economic interest is not distinguishable from the effect on the public generally. Step eight is an exception that applies when the official is legally required to participate in the decision. General information on both of these exceptions is in the, "Can I Vote? Conflicts of Interest Overview" pamphlet, which is also enclosed. It is possible that the predominant industry exception may apply; however, we lack sufficient information to make this determination.⁵

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

Sincerely,

Luisa Menchaca
General Counsel


By: Holly B. Armstrong
Staff Counsel, Legal Division

Enclosures

HBA:jg

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⁵ Regulation 18707.7 states: "Where a decision will affect an industry, trade, or profession in substantially the same manner as the decision will affect an official's economic interest, the industry, trade, or profession constitutes a 'significant segment' of the jurisdiction only as set forth below:

"(a) In the case of an elected state officer

"(b) In the case of any other official, an industry, trade, or profession constitutes a significant segment of the public generally if that industry, trade, or profession is a predominant industry, trade, or profession in the official's jurisdiction or in the district represented by the official. An industry, trade, or profession that constitutes fifty percent or more of business entities in the jurisdiction of the official's agency or the district the official represents is a 'predominant' industry, trade, or profession for purposes of this regulation."