



FAIR POLITICAL PRACTICES COMMISSION

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October 6, 2004

Janet Bibby
5059 Hornitos Road
Catheys Valley, CA 95306

**Re: Your Request for Advice
Our File No. A-04-188**

Dear Ms. Bibby:

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

QUESTIONS

1. May you participate in negotiations between the County of Mariposa and the Sheriff's Management Association?
2. May you participate in decisions regarding the general plan update, specifically the decision to extend the Mariposa town boundary to include the Mariposa-Yosemite Airport?

CONCLUSIONS

1. Generally, because a decision to increase the salaries and benefits of all employees in the same classification in which your husband is placed would not create a conflict of interest for you under the Act, you will be permitted to participate in collective bargaining agreements involving adoption of general personnel policies. However, a decision to hire, fire, promote, demote, or discipline your husband, or to set a salary for your husband which is different from salaries paid to other employees of the Mariposa County Sheriff's office in the same job classification or position would require your disqualification from participation in the governmental decision.

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

2. You may not make, participate in making or influence any decision regarding amendments to the general plan, unless you can rebut the presumption of materiality resulting from the location of your real property interest within the boundaries of the areas proposed for amendment by the general plan.

FACTS

You were elected to serve as District 3, Mariposa County Supervisor in 2003. Your husband, Joel Bibby, is a captain with the Mariposa County Sheriff's Department, and was elected this year by his Sheriff's Management Association ("association") as its president. The association represents sheriff's office employees from sergeants to the undersheriff. The Mariposa County Board of Supervisors ("board") hired a negotiating firm that will directly work with the bargaining unit. There will, however, be participation and issues on which the board will have to provide direction prior to the final vote. Although the association's contract expires in 2005, there are insurance and vacation leave issues already surfacing.

Your second question concerns the fact that the board is currently participating in a general plan update that has been an ongoing process since 2001. The planning commission sent a draft version with their recommendations; however, the board is currently changing those recommendations. The planning commission recommended that the Mariposa town boundary be extended to include the Mariposa-Yosemite Airport.

You have a 1/7 remaining interest in your grandfather's large probate estate, most of which is within Mariposa County. The estate includes property which surrounds the Mariposa-Yosemite Airport and is currently being used for cattle ranching and grazing. Prior to your seeking office, on two separate occasions, Mariposa County took action to condemn a portion of this ranch. The family and the county settled, although a resolution of condemnation was taken. As a result, the estate sold 3 acres to the county for utilization as a helipad for visitors of the airport and eight acres for the county to build airplane hangars. The county has routinely referenced property surrounding the airport as a future home-based business area with inexpensive parcels in which to relocate.

Through the general plan update process, all land between today's existing township would be encompassed in a new township boundary which extends approximately ten miles from the town to the airport. The general plan will change the existing land use but will not rezone properties (your estate parcel is currently zoned agricultural exclusive). The general plan update includes text references of condemning and/or acquiring land to create an industrial park for private home-based businesses to relocate to the airport as also referenced in the 1995 airport plan which will also have to be updated at a later date.

ANALYSIS

Your questions raise issues under the Act's conflict-of-interest rules. These rules prohibit a public official from making, participating in making, or using his or her official position in any way 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.) 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. To determine whether a public official has such a "conflict of interest" in a governmental decision, the FPPC has developed a standard, eight-step analysis outlined at subdivisions 1 through 8 of regulation 18700(b). A review of this standardized analysis will assist in determining when, if at all, you may find yourself faced with a conflict of interest.

Steps 1. & 2. Are you a public official making, participating in making, or influencing a governmental decision?

The conflict-of-interest prohibitions apply only to public officials. As a supervisor for the County of Mariposa, you are a "member, officer, employee or consultant of a state or local government agency" and are, therefore, a public official subject to the conflict-of-interest provisions of the Act. (Section 82048; regulation 18701(a).)

A public official "makes a governmental decision" when the official, acting within the authority of his or her office or position, votes on a matter, obligates or commits his or her agency to any course of action, or enters into any contractual agreement on behalf of his or her agency. (See regulation 18702.1.) A public official "participates in making a governmental decision" when, acting within the authority of his or her position and without significant substantive or intervening review, the official negotiates, advises or makes recommendations to the decision-maker regarding the governmental decision. (Regulation 18702.2.) Your involvement in either negotiations between the County of Mariposa and the Sheriff's Management Association, or decisions regarding the general plan update will no doubt involve a mix of both participating and making governmental decisions, depending on whether or not you are actually voting or participating in negotiations and discussions. (Regulation 18702.1(a)(1).)

Step 3. What are your economic interests -- the possible sources of a conflict of interest?

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, described as follows:

- A public official has an economic interest in a business entity in which he or she has a direct or indirect investment² of \$2,000 or more (section 87103(a); regulation 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 property³ in which he or she has a direct or indirect interest of \$2,000 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 \$500 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 \$340 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 finances, including those of his or her immediate family -- this is the "personal financial effects" rule (section 87103; regulation 18703.5).

The possible economic interests relevant to your first question are as follows:

Is the Mariposa County Sheriff's Department a Source of Income to You?

Because a public official's income, for purposes of the Act, includes a community property interest in the income of his or her spouse (section 82030(a)), your spouse's income is considered to be income to you, meaning that you would have an economic interest in the source of that income. (*Ibid.*; section 87103(c).) In general, "income" means:

² An indirect investment or interest means any investment or interest owned by the spouse of an official or by a member of the official's immediate family, by an agent on behalf of a public official, or by a business entity or trust in which the official, the official's immediate family, or their agents own directly, indirectly, or beneficially a 10-percent interest or greater. (Section 87103.) "Immediate family" is defined at section 82029 as an official's spouse and dependent children.

³ "Interest in real property" includes:

"... any leasehold, beneficial or ownership interest or an option to acquire such an interest in real property located in the jurisdiction owned directly, indirectly or beneficially by the public official, or other filer, or his or her immediate family if the fair market value of the interest is two thousand dollars (\$2,000) or more. Interests in real property of an individual includes a pro rata share of interests in real property of any business entity *or trust* in which the individual or immediate family owns, directly, indirectly or beneficially, a 10-percent interest or greater." (Section 82033, emphasis added.)

“ . . . a payment received, including but not limited to any salary, wage, advance, dividend, interest, rent, proceeds from any sale, gift, including any gift of food or beverage, loan, forgiveness or payment of indebtedness received by the filer, reimbursement for expenses, per diem, or contribution to an insurance or pension program paid by any person other than an employer, and *including any community property interest in the income of a spouse.*” (Section 82030(a), emphasis added.)

However, section 82030(b)(2) provides that income does not include:

“Salary and reimbursement for expenses or per diem received from a state, local, or federal government agency and reimbursement for travel expenses and per diem received from a bona fide nonprofit entity exempt from taxation under Section 501(c)(3) of the Internal Revenue Code.” (Section 82030(b)(2).)

Thus, salary⁴ and reimbursement for expenses from a state, local, or federal governmental agency are expressly excluded from the Act’s definition of income by what is known as the “government salary exception.” (Section 82030(b)(2).) Because wages received by your husband from the Mariposa County Sheriff’s Department are excluded from the definition of income by the government salary exception, you do not have an economic interest in the sheriff’s department.

Is Your Husband’s Position as President of the Sheriff’s Management Association an Economic Interest of Yours?

You state that your husband is president of the Mariposa County Sheriff’s Management Association. Assuming that the association is a nonprofit entity and not a “business entity” as defined in the Act,⁵ his office is not a business position under section 87103(d) (see above). In addition, if your husband does not receive income from the association, you will not have an economic interest in the association. (See *Mason Advice Letter*, No. I-93-418.) However, even if your husband’s position with the association is unsalaried, section 82030 incorporates into the definition of income such payments as “reimbursement for expenses” and “per diem.” We have no information to suggest your husband receives such payments, but please be aware that if he does, and those payments total \$1,000 (making your community property interest \$500) or more in any 12-month period, then the association will be considered to be a source of income to

⁴ Included in the government salary exception are fringe benefits that are part of a compensation package paid by a governmental agency such as pension benefits, health benefits, deferred compensation, tax sheltered annuities, life insurance, leaves, etc., which are considered by the Commission to be a part of the total salary in that the employee agrees to receive a smaller payment in exchange for receiving the remaining portion of his compensation by way of these fringe benefits. (Regulation 18232; *In re Moore* (1977) 3 FPPC Ops. 33; *James Advice Letter*, No. A-88-469.)

⁵ “Business entity” is defined in section 82005 as “any organization or enterprise operated for profit, including but not limited to a proprietorship, partnership, firm, business trust, joint venture, syndicate, corporation or association.”

you. If it is reasonably foreseeable that a decision will have a material financial effect on the association itself (as opposed to individual members of the association), your disqualification would be required. Because we have no facts to suggest that this is the case, we will not pursue this line of inquiry further.

Your Personal Finances

As described above, you also have an economic interest in your personal finances and those of your immediate family. (Regulation 18703.5.) A governmental decision is considered to have an effect on your personal finances if the decision will result in your personal expenses, income, assets, or liabilities or those of your immediate family increasing or decreasing by at least \$250 in any 12-month period. (Section 87103; regulations 18703.5; 18704.5; 18705.5(a).) However, the personal financial effects test does not require disqualification if the decision affects only the salary, per diem, or reimbursement for expenses an official may receive from a local government agency. (Regulation 18705.5(b).)

Despite this exception, however, a public official may not make, participate in making or use his or her official position to influence decisions to hire, fire, promote, demote, or discipline his or her spouse, or set the spouse's salary to a level that is different from salaries paid to other employees in the same job classification or position. (Regulation 18705.5(b).) The FPPC has interpreted this provision to permit participation in collective bargaining agreements involving adoption of general personnel policies. For example, in the *Walker* Advice Letter, No. A-89-596, staff advised that a member of a county board of education could participate in collective bargaining decisions concerning his spouse's bargaining unit which might adversely or beneficially affect his spouse, so long as the decisions affected all employees in the same job classification in the same manner. (See also, *Carton* Advice Letter, No. I-90-166, and *Rice* Advice Letter, No. A-88-053.)

In the absence of more facts, we will assume that this completes the analysis of your first question regarding your husband's positions with the County of Mariposa and the Mariposa County Sheriff's Management Association.

The possible economic interests relevant to your second question are as follows:⁶

Interests in Real Property

Assuming you have a direct or indirect interest of \$2,000 in the property left to you in your grandfather's estate, you will have an economic interest in this real property. (Sections 82033 and 87103(b); regulation 18703.2.)

⁶ Please keep in mind, as described above, every public official has an economic interest in his or her personal finances.

Potential Interests in a Business Entity and Sources of Income

Because you state in your letter that cattle are being ranched and grazed on the property discussed above, it appears possible that you may have additional interests in both a business entity engaged in the business of ranching and sources of income to that business entity. Because we do not have enough information to explore this possibility, we are enclosing the fact sheet "Can I Vote?" and encourage you to contact us with more facts should you have further questions.

Step 4. Will these economic interests be directly or indirectly involved in the decision?

The next step is to determine whether your economic interests will be involved directly or indirectly in the decision. (Regulation 18700(b)(4).)

Real Property

Regulation 18704.2(a) describes the circumstances under which an economic interest in real property is directly involved in a governmental decision, while subdivision (b) of the same regulation describes particular instances in which real property interests are not directly involved in a governmental decision.

A real property interest is directly involved in a governmental decision under any of the following circumstances:

- “(1) The real property in which the official has an interest, or any part of that real property, is located within 500 feet of the boundaries (or the proposed boundaries) of the property which is the subject of the governmental decision. For purposes of subdivision (a)(5), real property is located ‘within 500 feet of the boundaries (or proposed boundaries) of the real property which is the subject of the governmental decision’ if any part of the real property is within 500 feet of the boundaries (or proposed boundaries) of the redevelopment project area.
- (2) The governmental decision involves the zoning or rezoning, annexation or deannexation, sale, purchase, or lease, or inclusion in or exclusion from any city, county, district or other local governmental subdivision, of the real property in which the official has an interest or a similar decision affecting the real property. For purposes of this subdivision, the terms ‘zoning’ and ‘rezoning’ shall refer to the act of establishing or changing the zoning or land use designation on the real property in which the official has an interest.
- (3) The governmental decision involves the issuance, denial or revocation of a license, permit or other land use entitlement authorizing a specific use or uses of the real property in which the official has an interest.

(4) The governmental decision involves the imposition, repeal or modification of any taxes or fees assessed or imposed on the real property in which the official has an interest.

(5) The governmental decision is to designate the survey area, to select the project area, to adopt the preliminary plan, to form a project area committee, to certify the environmental document, to adopt the redevelopment plan, to add territory to the redevelopment area, or to rescind or amend any of the above decisions; and real property in which the official has an interest, or any part of it is located within the boundaries (or the proposed boundaries) of the redevelopment area.

(6) The decision involves construction of, or improvements to, streets, water, sewer, storm drainage or similar facilities, and the real property in which the official has an interest will receive new or improved services.”
(Regulation 18704.2(a).)

The decision before you is whether or not the Mariposa town boundary should be extended to include the Mariposa-Yosemite Airport thereby creating a new township boundary which would extend approximately ten miles from the town to the airport. In addition, you state in your letter that the general plan may change the existing land use, although it will not rezone properties, and possibly condemn or acquire land to create an industrial park for private home-based businesses to relocate near the airport. Therefore, it appears that your real property would be directly affected by the general plan decisions under subdivisions (a)(1), (2), and (3) above.⁷

Steps 5. & 6. - What is the applicable materiality standard and is it reasonably foreseeable that the financial effect of the governmental decision upon the officials' economic interest will meet this materiality standard?

After arriving at the degree (i.e., “direct” or “indirect”) to which the economic interest is involved in the decision, the next step is picking the appropriate standard for evaluating the materiality, that is, the importance of the effect of the decision on the economic interest. (Regulation 18700(b)(5).) Once the degree of involvement is determined, Step 5 of the conflict-of-interest analysis addresses the applicable materiality standard. Regulation 18705.2(a) sets forth the materiality standards for directly involved real property economic interests. Under regulation 18705.2(a)(1), “[t]he financial effect of a governmental decision on the real property is presumed to be material.”

⁷ Recent amendments to regulation 18704.2 have established criteria under which the involvement of real property in certain broad, policy-making general plan decisions are deemed indirect. However, the facts of your letter indicate that the general plan decisions before the board do not meet the criteria set forth in the regulation (copy enclosed).

The sixth, and usually most important step, in deciding whether you have a conflict of interest is using the materiality standards (from step 5) to decide if a material financial effect on one or more of your economic interests is reasonably foreseeable as a result of the decision. (Regulation 18706.) As used here, "reasonably foreseeable" means "substantially likely." (Regulation 18706; *In re Thorner* (1975) 1 FPPC Ops. 198.) 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.*)

Inherent in the regulation is a presumption that the financial effect of the decision on your real property interest is material when the property is directly involved. In order to rebut the presumption of regulation 18705.2(a)(1), you would be required to show that it is not reasonably foreseeable that the decision will have any financial effect on your property. Thus, you would have to show that it is not reasonably foreseeable that the effect of general plan amendments that could potentially incorporate your property into the township of Mariposa, change the permitted use of the land, and permit the county to condemn and acquire property, would have even a penny's effect on your real property. We note that your letter states that on two separate occasions, Mariposa County took action to condemn a portion of the property you own. This would suggest that the general plan amendments may have some financial effect on your property.

Steps 7. & 8: Exceptions.

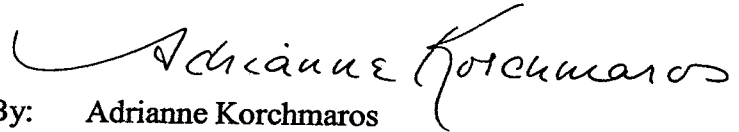
An official who otherwise would have a conflict of interest in a decision may still participate in that decision if the circumstances are such that the "public generally" rule might be invoked. This rule applies when the reasonably foreseeable financial effect of a decision upon a public official's economic interests is material, but not distinguishable from foreseeable effects on a significant segment of the public generally. (Section 87103; regulation 18707(a).) Because we have no information about foreseeable effects on a significant segment of the public generally, we are unable to offer you guidance on application of the exception.

Finally, an official with a conflict of interest in a decision may still participate in that decision if the "legally required participation" rule is applicable. (Section 87101; regulation 18708.) This is an exception that typically applies when an agency is unable to assemble a quorum of its members without the participation of an official who has a conflict of interest. At present, we have no basis for concluding that a quorum of the board will not be available to make any legally required decisions on the general plan amendment.

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

Sincerely,

Luisa Menchaca
General Counsel



By: Adrienne Korchmaros
Political Reform Consultant

Enclosures

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