



FAIR POLITICAL PRACTICES COMMISSION

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December 6, 2004

Stephen A. Kronick
Bartkiewicz, Kronick & Shanahan
1011 Twenty-second Street
Sacramento, CA 95816-4907

**Re: Your Request for Advice
Our File No. A-04-220**

Dear Mr. Kronick:

This letter is in response to your request on behalf of John P. Swift, a director on the Board of Directors of the Amador Water Agency, for advice regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").¹

QUESTION

May Director Swift participate in a water transmission pipeline and storage tank decision involving property held by a family trust of which he is a beneficiary?

CONCLUSION

Director Swift does not have an economic interest in the real property, income, or investments of this trust based on your account of the facts. Therefore, he may participate in this decision provided he has no other economic interests which would trigger a conflict of interest.

FACTS

John P. Swift is a member of the Board of Directors of the Amador Water Agency ("agency") which is governed by five elected directors. The agency provides water and wastewater service within various areas of Amador County. The City of Plymouth is reviewing various alternatives to supplement its existing water supply. One of those

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

alternatives is obtaining a supplemental supply from the agency pursuant to a wholesale water service contract. The city has not yet decided which alternative to pursue.

If the City of Plymouth requests a water supply from the agency, then a lengthy water transmission pipeline and a storage tank would have to be installed in order to transport water from the terminus of the agency's existing water facilities to the City of Plymouth. A possible location of a significant segment of the water transmission pipeline and the water storage tank itself would be on property in which the parents of Director Swift own a 50% interest through a revocable family trust, with Director Swift and his four siblings named as beneficiaries under the trust. Upon the death of both parents, each beneficiary would receive a one-fifth interest in their parents' 50% interest in the property. The five beneficiaries, including Director Swift, do not receive any income from the trust. The other 50% interest in the property is held by two cousins of Director Swift.

The subject property consists of approximately 500 acres located north of Sutter Creek and southeast of Drytown in Amador County. The property has an estimated value in excess of \$50,000. Locating the pipeline and storage tank on the subject property could be advantageous to the property's development since it would improve the property's access to water service which otherwise may be less feasible. However, there are currently no specific plans for its development.

It is anticipated that the agency would own the pipeline and storage tank and acquire the necessary property interests from the owners of the subject property, although these issues have not yet been addressed. Responsibility for the construction and cost of the facilities also has not been discussed, although it is likely that the cost would be shared between the city and the agency.

ANALYSIS

The primary purpose of the Act's conflict-of-interest provisions is to ensure that public officials, whether elected or appointed, 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. In furtherance of this goal, the Act prohibits a 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. (Section 87100.) Pursuant to regulation 18700, an eight-step analysis is applied to determine whether a public official has a conflict of interest in a given governmental decision.

Steps One and Two: Is Director Swift considered a "public official" and would he make, participate in making, or influence a governmental decision?

The Act's conflict-of-interest provisions apply only to public officials. A public official includes "every member, officer, employee or consultant of a state or local government agency." As a member of the Board of Directors of the Amador Water

Agency, Director Swift is a public official subject to the Act's conflict-of-interest provisions. (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. (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.) A public official attempts to use his or her official position to "influence" a decision if, for the purpose of influencing, the official contacts or appears before any member, officer, employee, or consultant of his or her agency. (Regulation 18702.3.)

Director Swift will be making, participating in making, or influencing a governmental decision if he engages any of the actions described above with regard to the water transmission pipeline and storage tank decision.

Step Three: What are Director Swift's economic interests – the possible sources of a conflict of interest?

The Act's conflict-of-interest provisions apply only to conflicts of interest arising from economic interests. These economic interests are defined in section 87103 of the Act and regulations 18703.1 – 18703.5, summarized below:

- A public official has an economic interest in a business entity in which he or she has a direct or indirect investment² of two thousand dollars 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 property in which he or she has a direct or indirect interest of two thousand dollars 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 five hundred dollars (\$500) or more within 12 months prior to the time in which the relevant governmental decision was made (section 87103(c); regulation 18703.3);

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.

- A public official has an economic interest in any source of gifts to him or her if the gifts aggregate to three hundred forty dollars 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 and those of his or her immediate family – this is the “personal financial effects” rule (section 87103; regulation 18703.5).

Based on the facts you have provided, the only economic interest which Director Swift may have is an interest in real property held by a trust. Under certain circumstances the property, income, and investments of a trust may be considered among a public official’s economic interests. Regulation 18234 specifically states:

“(a) An official has an economic interest in the pro rata share of the interests in real property, sources of income, and investments of a trust in which the official has a direct, indirect, or beneficial interest of 10 percent or greater.

¶...¶

(c) For purposes of determining whether an official has an economic interest in interests in real property, sources of income, and investments of a trust, the official has a direct, indirect, or beneficial interest in a trust if the official is:

(1) A trustor and:

(A) Can revoke or terminate the trust;

(B) Has retained or reserved any rights to the income or principal of the trust, or retained any reversionary or remainder interest; or

(C) Has retained or reserved any power of appointment, including but not limited to the power to change the trustee, or the power to amend, alter or designate, either alone or in conjunction with anyone else, the person or persons who shall possess or enjoy the trust property or income.

(2) A beneficiary and:

(A) Presently receives income; or

(B) Has an irrevocable future right to receive income or principal. For purposes of this subsection, an individual has an irrevocable future right to receive income or principal if the trust is irrevocable, unless one of the following applies:

(i) Powers exist to consume, invade, or appoint the principal for the benefit of beneficiaries other than the official and such powers are not limited by an ascertainable standard relating to the health, education, support, or maintenance of the beneficiaries; or

(ii) Under the terms of the trust, someone other than the official can designate the persons who shall possess or enjoy the trust property or income....”

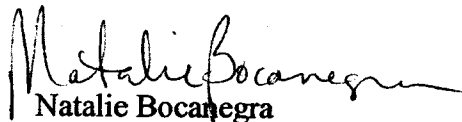
You indicate that Director Swift is a beneficiary of a family trust holding property on which the pipeline and storage tank could be located. Because he is not a trustor, subdivision (c)(1) of regulation 18234 does not apply to his situation. In addition, although Director Swift is a beneficiary of this trust, he neither receives income from the trust nor does he have “an irrevocable future right to receive income or principal,” since you have stated that the trust is revocable. Consequently, subdivision (c)(2) of regulation 18234 also does not apply, so Director Swift does not have an economic interest in the real property, income, or investments of the trust.

As noted above, Director Swift always has an economic interest in his personal finances and those of his immediate family.³ If he knows or has reason to know that it is reasonably foreseeable that the decision will affect his personal finances by at least \$250 in any 12-month period, he would have a conflict of interest in that decision. (Section 87103; regulations 18700 and 18705.5(a).) However, you have not provided information indicating that these circumstances exist or information regarding any other economic interests that Director Swift may have. For purposes of this letter, we assume that he has no other economic interests relevant to the decision you have identified.

Consequently, provided Director Swift has no other economic interests which would trigger a conflict of interest, he will not have a conflict of interest in the water transmission pipeline and storage tank decision. If you have any other questions regarding this matter, please contact me at (916) 322-5660.

Sincerely,

Luisa Menchaca
General Counsel

By: 
Natalie Bocanegra
Counsel, Legal Division

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³ See footnote 2.