



FAIR POLITICAL PRACTICES COMMISSION

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June 20, 2005

Bernard C. Barmann, Sr.
Office of the County Counsel
County of Kern
1115 Truxtun Avenue, Fourth Floor
Bakersfield, CA 93301

**Re: Your Request for Advice
Our File No. A-05-127**

Dear Mr. Barmann:

This letter is in response to your request on behalf of Bakersfield County Supervisor Don Maben for advice regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").¹

QUESTION

If Supervisor Maben trades with a wind energy development company 20 acres of property in exchange for 20 acres of property, will he have an economic interest in the wind energy development company for the following 12 months that would prevent him from being involved in a decision affecting the wind energy development company?

CONCLUSION

Yes. If it is reasonably foreseeable that the decision in question will have a material financial effect on Supervisor Maben's economic interests, he will have a disqualifying economic interest in the wind energy development company that would prevent him from participating in the decision. Additionally, the property that Supervisor Maben acquires from the transaction may be a potentially disqualifying economic interest for him.

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

FACTS

Supervisor Maben owns twenty acres of property within his district. First, he proposes to exchange dollar for dollar in value, 20 acres of desert land that is zoned "agricultural" currently owned by Supervisor Maben and his spouse. Land zoned "agricultural" in the area would be deeded to him in the exchange by a wind energy development company. That company plans to apply for a zone change to WE ("wind energy") for that property and the matter would come before the board of supervisors on which Mr. Maben sits for a decision.

Supervisor Maben wants to structure the exchange in such a way that he can vote on the zone change and an easement issue that is associated with the wind energy development on the twenty acres. It is your belief that an outright sale to the wind energy company by him and his wife would result in the wind energy company being a "source of income" which would preclude the supervisor from being involved in any decision related to the wind energy company for twelve months. A bona fide charity that could deal with the energy company was considered but would deprive him and his family the value of their long-held investment. The issue is whether a property exchange, assuming the properties are of equal value based on the independent evaluation of a qualified appraiser, will preclude Supervisor Maben from voting or otherwise being involved in decisions that affect the wind energy company.

ANALYSIS

The Act stipulates that public officials "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, a public official is prohibited 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; Regulation 18700(a).) Within the meaning of the Act, a public official has a "financial interest" in a governmental decision if 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).) If the material financial effect is reasonably foreseeable, and no exception applies, the public official has a disqualifying conflict of interest and must recuse himself or herself from discussing and voting on the matter, or otherwise acting in violation of Section 87100. (Section 87105; Regulation 18702.)

The Commission has adopted an eight-step standard analysis for determining whether an official has a disqualifying conflict of interest. (Section 87100; Regulation 18700, subdivisions (b)(1) - (8).)

Step One: Is Supervisor Maben a Public Official?

As Bakersfield County Supervisor, Mr. Maben is a "member, officer, employee or consultant of a state or local government agency" and is, therefore, a public official

subject to the conflict-of-interest provisions of the Act. (Section 82048, Regulation 18701.)

Step Two: Will Supervisor Maben Make, Participate in Making, or Use or Attempt To Use His Official Position To Influence a Governmental Decision?

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, appoints a person, 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. (Section 87100; Regulation 18702.1.) A public official "participates in making a governmental decision" when, acting within the authority of his or her position and without substantive review, the official negotiates with, advises, or makes recommendations to, the decisionmaker regarding the governmental decision. (Section 87100; Regulation 18702.2.) A public official "attempts to use his or her official position to influence a decision before his or her own agency" if, for the purpose of influencing the decision, the official contacts, or appears before, or otherwise attempts to influence, any member, officer, employee, or consultant of his or her agency. (Section 87100; Regulation 18702.3.)²

Accordingly, Supervisor Maben will "make a governmental decision" if he votes on the zone change and easement decision in his official capacity.

Step Three: What Are Supervisor Maben's Economic Interests?

A public official has an economic interest 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 enumerated economic interests, including:

- An economic interest in a business entity in which he or she has a direct or indirect investment 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).)
- An economic interest in real property in which he or she has a direct or indirect interest of \$2,000 or more in fair market value. (Section 87103(b); Regulation 18703.2, see Section 82033 [defining "Interest in Real Property"].)

² If a public official's office is listed in section 87200 ("87200 filers" include members of a board of supervisors) and he or she has a conflict of interest in a decision noticed at a public meeting, then he or she must: (1) immediately prior to the discussion of the item, verbally identify each type of economic interest involved in the decision as well as details of the economic interest, as discussed in regulation 18702.5(b)(1)(B), on the record of the meeting; (2) recuse himself or herself; and (3) leave the room for the duration of the discussion and/or vote on the item. For closed sessions, consent calendars, absences and speaking as a member of the public regarding personal interests, special rules found in regulation 18702.5, subdivisions (c) and (d) apply. (Section 87105). These requirements are applicable to Supervisor Maben if he has a conflict of interest in the governmental decision in question.

- An economic interest in any source of income to him or her, which aggregates to \$500 or more within 12 months prior to the decision. (Section 87103(c); Regulation 18703.3.)
- An economic interest in any source of gifts to him or her, if the gifts aggregate to \$360 or more within 12 months prior to the decision. (Section 87103(e); Regulation 18703.4.)
- An economic interest in his or her personal finances, including those of his or her immediate family. (Section 87103; Regulation 18703.5.)

Supervisor Maben has an economic interest in any organization from whom he has received income aggregating to at least \$500 within 12 months prior to the time when the relevant governmental decision is made. (Section 87103(c); Regulation 18703.3(a)(1).) Section 82030 of the Act defines “income” broadly as “payment received.” Section 82044 of the Act defines “payment” as any “payment, transfer, loan, advance, deposit, gift or other *rendering of money, property, services* or anything else of value, whether tangible or intangible.” (Emphasis added.) The information that you provided indicates that the transaction between Supervisor Maben and the wind energy development company would include a rendering of property. Therefore, assuming that the value of the property rendered to Supervisor Maben aggregates to at least \$500, Supervisor Maben has a “source of income” economic interest. (Section 87103(c); Regulation 18703.3(a)(1).) The source of income would be potentially disqualifying for 12 months. (Section 87103(c), Regulation 18703.3(a)(1).)

Supervisor Maben may also have a “real property” economic interest. A public official has an economic interest in any real property in which the public official has a direct or indirect interest worth \$2000 or more in fair market value. (Section 87103(b); Regulation 18703.2.) If the real property acquired from the wind energy development company by Supervisor Maben is within the county jurisdiction and is worth at least \$2000 in fair market value, Supervisor Maben has a “real property” economic interest.

Step Four: Are Supervisor Maben’s Economic Interests Directly or Indirectly Involved in The Governmental Decision He Would Like To Make?

A person, including a 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 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. (Section 87103; Regulation 18704.1(a).)

Information that you provided indicates that the wind energy development company may initiate, or be a named party in, or be the subject of, a proceeding for a zone change. Therefore, the wind energy development company would be directly involved in the governmental decision before Supervisor Maben.

An economic interest in the real property that Supervisor Maben acquires from the wind energy development company may also be directly involved in the governmental decision he would like to make. Real property in which a public official has an economic interest is directly involved in a governmental decision if:

(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 real property which is the subject of the governmental decision. (Section 87103(b); Regulation 18704.2(a).)

If the real property acquired from the wind energy development company by Supervisor Maben is within 500 feet of the boundaries of the real property which is the subject of the governmental decision, the real property he acquires is directly involved in that governmental decision.

Step Five: Are the Financial Effects on Supervisor Maben's Economic Interests Material?

Any reasonably foreseeable financial effect on a person, including a company, who is a source of income to a public official, and who is directly involved in a decision before the official's agency, is deemed material. (Section 87103(c); Regulation 18705.3, see Section 82047 [defining "Person"].)

Accordingly, if the governmental decision that Supervisor Maben would like to make will have any financial effect on the wind energy development company, that effect will be deemed material.

Additionally, if the real property Supervisor Maben acquires from the wind energy development company is directly involved in the governmental decision, any financial effect on the real property is presumed to be material. This presumption may be rebutted by proof that it is not reasonably foreseeable that the governmental decision will have any financial effect on the real property. (Section 87103(b); Regulation 18705.2.)

Step Six: Are the Financial Effects on Supervisor Maben's Economic Interests Reasonably Foreseeable?

A material financial effect upon an economic interest is considered "reasonably foreseeable" if there is a substantial likelihood that it will occur. (Section 87103;

Regulation 18706(a.) A financial effect need not be certain to be considered reasonably foreseeable, but it must be more than a mere possibility. (*In re Thorner* (1975) 1 FPPC Ops. 198.) Therefore, whether the financial effects on Supervisor Maben's economic interests are reasonably foreseeable depends on the likelihood that the governmental decision he would like to make will have a material financial effect on his source of income or the property that he will acquire. Whether the material financial consequences of the zone change and easement decision are substantially likely to result depends on the facts surrounding the decision. Without these facts we cannot further analyze this question.

Steps Seven & Eight: Public Generally and Legally Required Participation


Even if a decision will have a reasonably foreseeable material financial effect on one or more of an official's economic interests, he or she may still participate in the decision if the effect is not distinguishable from the effect on the public generally. (Section 87103; Regulation 18707.) However, the information that you provided does not suggest that the "public generally" exception would apply to the decision in question.

Additionally, an official may be called upon to participate in a governmental decision despite the fact that he or she may have a disqualifying conflict of interest. This "legally required participation" exception applies only in particular circumstances where the relevant governmental agency would be otherwise paralyzed from acting. (Section 87101; Regulation 18708.) You also have not indicated that this exception would apply to the decision in question.

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

Sincerely,

Luisa Menchaca
General Counsel


By: Crystal Muhlenkamp
Intern, Legal Division

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