



FAIR POLITICAL PRACTICES COMMISSION

428 J Street • Suite 620 • Sacramento, CA 95814-2329
(916) 322-5660 • Fax (916) 322-0886

March 30, 2007

Ms. June R. McIvor
Sinsheimer Juhnke Lebens & McIvor, LLP
1010 Peach Street
San Luis Obispo, California 93406

**RE: Your Request for Informal Assistance
Our File No. I-07-027**

Dear Ms. McIvor:

This letter is in response to your request for advice on behalf of San Luis Obispo County Supervisor Bruce Gibson regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").¹ This letter is based on the facts presented; the Fair Political Practices Commission (the "Commission") does not act as a finder of fact when it renders advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) Because your questions are of a general nature, we are providing you with informal assistance.²

Also, please note that our advice is based solely on the provisions of the Act. We therefore offer no opinion on the application, if any, of other conflict-of-interest laws such as common law conflict of interest or Government Code Section 1090.

QUESTIONS

1. Does Supervisor Gibson have a potential conflict of interest prohibiting him from making, participating in, or otherwise influencing governmental decisions regarding a proposed amendment to the Areawide Standards, Adelaida Planning Area, of the County Land Use Ordinance as a result of his economic interest in real property where the property is under a Williamson Act contract?

2. If Supervisor Gibson has a conflict of interest in the above decision, can the proposed amendment be bifurcated so that Supervisor Gibson can vote on the Highway 1

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 requestor with the immunity provided by an opinion or formal written advice. (Section 83114; regulation 18329(c)(3), copy enclosed).

Critical Viewshed, while abstaining from action on the Cayucos Fringe Critical Viewshed?

CONCLUSIONS

1. Supervisor Gibson has a conflict of interest and is prohibited from participating in the decision. However, if the Williamson Act contract provisions that already restrict the use of the supervisor's property do so in the same or stricter manner than the restrictions being considered as part of the governmental decision, the decision would have no reasonably foreseeable financial effect on the property.

2. The proposed amendment can be segmented so that Supervisor Gibson can vote on the Highway 1 Critical Viewshed, while abstaining from action on the Cayucos Fringe Critical Viewshed, if the decision can be broken down into two separate decisions that are not inextricably interrelated, as discussed below.

FACTS

At issue is a county-initiated amendment to the Land Use Ordinance that would establish development standards to protect scenic views in two portions of the Adelaida Planning Area in the vicinity of Cayucos. The Board of Supervisors authorized the amendment for processing on August 13, 2002. Planning Commission staff has been working on the amendment since then. Supervisor Gibson joined the Board of Supervisors in January 2007.

The first portion of the Adelaida Planning Area that the proposed amendment affects is referred to as the Highway 1 Critical Viewshed, and it covers areas that are generally visible from Highway 1 and vicinity within one mile of the highway, approximately between Toro Creek Road and Villa Creek. The proposed amendment would apply standards for scenic view protection, to a variety of uses and activities, including residential and residential accessory structures, and agricultural and agricultural accessory structures that are greater than 1,000 square feet in area and that normally require discretionary approval.

The second viewshed proposed by the amendment is the "Cayucos Fringe Critical Viewshed." It covers an inland area in the Adelaida Planning Area that is generally visible from specified county roads, where the hilly and steep terrain, ridgelines and ridgetops, and narrow valleys that characterize the rural area's scenic views. Within this area, proposed standards protect visual resources through standards that are similar to, but not as comprehensive as, the standards for the proposed Highway 1 Critical Viewshed.

Supervisor Gibson does not own any property or have any other economic interests within the area proposed to be designated as the Highway 1 Critical Viewshed. He does however, own a parcel within the area proposed to be designated as the Cayucos Fringe Critical Viewshed. The property Supervisor Gibson owns is under a Williamson Act contract that is in the rolling 10-year portion of its term and no notice of non-renewal

is in effect. It is our understanding that, under current law, the Williamson Act contract imposes stricter, albeit different, restrictions on the use of the property than the proposed viewshed ordinances; these restrictions require that any additional uses of Supervisor Gibson's parcel would have to directly relate to the agricultural operations on the property, and residential uses would have to be for farm support quarters.

In our telephone conversation on March 23, 2006, you stated that the ordinance under consideration would affect all properties within the Cayucos Fringe Critical Viewshed. While the specifics of the decisions are still a subject of discussion, including defining the boundaries of what is to be the Cayucos Fringe Critical Viewshed, the basic concept under consideration involves establishing restrictions on any structures that would interfere with the scenic views in the area, including those visible from the roadside. The proposed amendment, as summarized on the County's website³ under the Board of Supervisors agenda items, states:

"The proposed amendment establishes a "Cayucos Fringe Viewshed" with development standards to protect views within one-mile of, and as seen from Highway 1, Old Creek Road and Santa Rita Road in a portion of the Adelaida Planning Area. The proposed development standards are intended to minimize the visibility and visual effects of new development through special setbacks from the road, limitations on development that silhouettes against the sky on certain prominent ridgelines, landscape screening, building heights limits, and other measures. The proposed amendment applies to the portions of the Adelaida Planning Area that are visible from and within one mile of: 1) Highway 1, approximately between Toro Creek Road and Villa Creek Road, 2) Old Creek Road from the coastal zone boundary (approximately 3,200 feet northerly of Highway 1) to its crest south of Highway 46, and 3) Santa Rita Road from Old Creek Road to a point roughly 5.5 miles to the northeast."

ANALYSIS

QUESTION ONE

POTENTIAL CONFLICT OF INTEREST

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).) 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, unless an exception applies.

³ www.slocounty.ca.gov/government.htm

The Commission has adopted an eight-step standard analysis for deciding whether an official has a disqualifying conflict of interest. (Regulation 18700(b).) The general rule, however, is that a conflict of interest exists whenever a public official makes a governmental decision that has a reasonably foreseeable material financial effect on one or more of his or her financial interests. (Section 87103.)

STEPS 1 & 2: IS SUPERVISOR GIBSON A PUBLIC OFFICIAL MAKING, PARTICIPATING IN MAKING, OR INFLUENCING A GOVERNMENTAL DECISION?

As an elected member of the San Luis Obispo County Board of Supervisors, Supervisor Gibson is a public official under the Act. (Section 82048.) Consequently, he may not make, participate in making, or otherwise use his official position to influence any decisions that will have a reasonably foreseeable material financial effect on any of his economic interests. Supervisor Gibson will be called upon to consider a proposed amendment to the Areawide Standards, Adelaida Planning Area, of the County Land Use Ordinance. Therefore, he will be making, participating in making, or otherwise using his official position to influence a governmental decision.⁴

STEP 3: DOES SUPERVISOR GIBSON HAVE A POTENTIALLY DISQUALIFYING ECONOMIC INTEREST?

A public official has a financial interest in a decision within the meaning of section 87103 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 one of five 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); reg. 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 (Section 87103(b); Regulation 18703.2);

⁴ When a public official who holds an office specified in section 87200 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, orally 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), 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(c) and 18702.5(d) apply.



- An economic interest in any source of income, including promised income, aggregating \$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 \$390 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 -- this is the "personal financial effects" rule (Section 87103; Regulation 18703.5).

Under the facts presented, the only economic interest of which you have advised us is a parcel of real property that Supervisor Gibson owns⁵ within the area proposed to be designated as the Cayucos Fringe Critical Viewshed. Accordingly, our conflict of interest analysis is limited to Supervisor Gibson's economic interest in this property.

STEP 4: IS THE ECONOMIC INTEREST DIRECTLY OR INDIRECTLY INVOLVED IN THE GOVERNMENTAL DECISION?

"In order to determine if a governmental decision's reasonably foreseeable financial effect on a given economic interest is material, it must first be determined if the official's economic interest is directly involved or indirectly involved in the governmental decision." (Regulation 18704(a).) For governmental decisions that affect real property interests, the standards set forth in regulation 18704.2 apply. (Regulation 18704(a)(2).)

Regulation 18704.2(a) states:

"(a) Real property in which a public official has an economic interest is directly involved in a governmental decision if any of the following apply:

"(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."

Additionally, real property is directly involved in a governmental decision if the decision "involves the zoning or rezoning,⁶ annexation or deannexation, sale, purchase, or lease, or inclusion in or exclusion from any city, county, district or other local

⁵ We assume Supervisor Gibson has an interest of \$2,000 or more in this property.

⁶ "Zoning" and "rezoning" refer to the act of establishing or changing the zoning or land use designation on the property in which the official has an interest. (*Ibid.*)

governmental subdivision, of the real property in which the official has an interest or a similar decision affecting the real property.” (Regulation 18704.2(a)(2).)

However, Regulation 18704.2(b)(1) applies an exception to this rule for certain types of land use decisions, and the real property is considered only indirectly involved. The exception provides:

“(b) Notwithstanding subdivision (a) above, real property in which a public official has an interest is not directly involved in a governmental decision, but is instead indirectly involved if:

“(1) The decision solely concerns the amendment of an existing zoning ordinance or other land use regulation (such as changes in the uses permitted, or development standards applicable, within a particular zoning category) which is applicable to all other properties designated in that category, which shall be analyzed under 2 Cal. Code Regs. section 18705.2(b).”

Accordingly, the determination as to whether Supervisor Gibson’s property is directly involved in the decision, or meets the exception under Regulation 18704.2(b)(1) and is indirectly involved, is dependant on whether the proposed amendment “is applicable to all other properties designated in that category.” (See *Barker* Advice Letter, No. A-03-028.) Although you have not presented any information regarding the zoning categories affected, from the facts presented, it does not appear that the amendment is applicable to all properties in a particular zoning category. Therefore, Supervisor Gibson’s property would not fall within this exception and his property would be directly involved in the decision.

STEP 5: MATERIALITY STANDARD

A conflict of interest arises only when the reasonably foreseeable financial effect of a governmental decision on a public official’s economic interest is material. (Regulation 18700(a).) For real property directly involved in a governmental decision, any financial effect, even “one penny,” is presumed to be material. (Regulation 18705.2(a)(1).) This is known as the “one penny” rule. 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. (*Ibid.*)

STEP 6: REASONABLY FORESEEABLE

An effect upon economic interests is considered “reasonably foreseeable” if there is a substantial likelihood that it will occur. (Regulation 18706(a).) Whether the financial consequences of a governmental decision are substantially likely at the time the decision is made depends on the facts surrounding the decision. 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.)

You have indicated that Supervisor Gibson's property is under a Williamson Act⁷ contract that is in the rolling 10 year portion of its term and no notice of non-renewal is in effect. Under your understanding, the Williamson Act contract "imposes stricter, albeit different, restrictions on the use of the property than the proposed viewshed ordinances." However, unless the Williamson Act contract provisions already impose restrictions beyond each and every restriction that would be considered in the governmental decision (so that the decision would have no affect on the property), the decision would impose new restrictions that could have a reasonably foreseeable financial effect on the property. To the extent that it would, Supervisor Gibson would have a conflict of interest that would prevent him from participating in the decision.

STEPS 7 AND 8: PUBLIC GENERALLY & LEGALLY REQUIRED PARTICIPATION

You have not presented any facts indicating that either the "public generally" or "legally required participation" exceptions would apply. Accordingly, we have not provided an analysis involving those steps. If you do find that additional facts might indicate that it is reasonably foreseeable that the materiality threshold will be met and you wish further advice on the public generally exception, please feel free to write again.

QUESTION TWO

CAN THE GOVERNMENTAL DECISION BE BIFURCATED?

Your second question asks if the County action regarding the proposed amendment can be bifurcated so that Supervisor Gibson can vote on the Highway 1 Critical Viewshed, while abstaining from action on the Cayucos Fringe Critical Viewshed. Regulation 18709(a) sets forth the requirements for segmentation of a decision:

"An agency may segment a decision in which a public official has a financial interest, to allow participation by the official, provided all of the following conditions apply:

"(1) The decision in which the official has a financial interest can be broken down into separate decisions that are not inextricably interrelated to the decision in which the official has a disqualifying financial interest;

"(2) The decision in which the official has a financial interest is segmented from the other decisions;

"(3) The decision in which the official has a financial interest is considered first and a final decision is reached by the agency without the disqualified official's participation in any way; and

⁷ Also known as the California Land Conservation Act of 1965 (Gov't. Code Section 51200).

“(4) Once the decision in which the official has a financial interest has been made, the disqualified public official’s participation does not result in a reopening of, or otherwise financially affect, the decision from which the official was disqualified.”

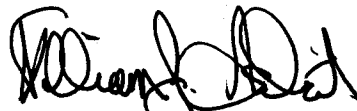
Subdivision (b) of Regulation 18709 further states that “decisions are ‘inextricably interrelated’ when the result of one decision will effectively determine, affirm, nullify, or alter the result of another decision.”

While it appears from the facts presented that the two viewshed decisions each involve different elements, you have not provided sufficient information for us to determine whether or not the two decisions can be separated into discrete issues that are not inextricably linked to each other. In the past the Commission has advised that some decisions may be too interrelated to be considered separately. For example, if the resolution of one decision will effectively determine the result of the other decision, the decisions may not be segmented. (See generally *Yang* Advice Letter, No. I-06-198; *Stone* Advice Letter, No. A-06-007; *Barker* Advice Letter, A-05; *Hull* Advice Letter, No. A-04-052.)

If you have additional facts you would like us to consider to assist you in making this determination, please feel free to seek supplemental advice regarding your question. If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Scott Hallabrin
General Counsel



By: William J. Lenkeit
Senior Counsel, Legal Division

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