



FAIR POLITICAL PRACTICES COMMISSION

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July 30, 2007

William James Murphy
Office of County Counsel
County of Tehama
332 Pine Street
Red Bluff, California 96080

RE: Your Request for Advice
Our File Nos. A- 07-031; A-07-050

Dear Mr. Murphy:

This letter responds to your requests¹ for advice on behalf of the Tehama County Planning Commissioners and the Tehama County Board of Supervisors regarding the conflict-of-interest provisions of the Political Reform Act (the "Act")² and 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.) Additionally, we base our advice solely on the provisions of the Act and do not address the applicability, if any, of other conflict-of-interest laws such as common law conflict of interest or Government Code Section 1090.

QUESTION

May the segmentation provisions of Regulation 18709 be utilized to allow the members of the board of supervisors and the planning commission to participate in the general plan update under the procedures outlined below?

CONCLUSION

Yes. The segmentation provisions of Regulation 18709 may be utilized to allow the members of the board of supervisors and the planning commission to participate in the general plan update under the procedures outlined below as long as the segmented decisions meet the conditions applicable under the regulation.

¹ We received separate requests for advice for the planning commission and the board of supervisors. We have combined our response to both requests in this letter.

² Government Code Sections 81000-91014. Commission regulations appear at title 2, Sections 18109-18997, of the California Code of Regulations.

FACTS

Tehama County (the "County") is a charter county divided into five supervisorial districts. The County is currently in the process of updating its general plan. The planning commission and the board of supervisors must conduct at least one public hearing in connection with the update. The planning commission will conduct its proceeding first, to consider input from the public and the general plan committee before making recommendations to the board of supervisors. The board of supervisors will then conduct further public hearings before making its final decision.

The County is composed of five supervisorial districts. Membership on the board of supervisors requires that the incumbent reside in the supervisorial district from which the supervisor is elected. The five members of the planning commission are appointed by the board of supervisors, but need not reside within a particular district. Each member of the board of supervisors and planning commission owns real property, and some have business interests in the County.

The members of the board of supervisors and the districts they represent are: Gregg Avilla—District One; George Russell—District Two; Charles Willard—District Three; Robert Williams—District Four; and Ron Warner—District Five. Supervisor Avila owns real property in District Two, as well as real property on which he resides in District One. The real property he owns in District One is located within an incorporated city more than 500 feet from the boundaries of the property that is the subject of the governmental decision. Each of the other members owns real property within his district, but Supervisor Russell's and Supervisors Warner's property is located within an incorporated city more than 500 feet from the boundaries of any of the county properties that are the subject of the governmental decision.

The planning commission members and the districts they represent are: Don Jones—District One; Linda Walker—District Two; Kim Tipton—District Three; William Turri—District Four; and Delbert David—District Five. Commissioners Jones,³ Walker, and Turri each own property in their respective districts. Commissioner Tipton owns real property in Districts One and Two. While Commissioner David also owns real property in his district, the only real property is located within an incorporated city (Corning), more than 500 feet from any county area under review. The planning commission will be considering an update to the county's general plan. The update will include both revisions to countywide goals, policies, and objectives, as well as changes to particular land use designations in various parts of the county. Your request relates only to possible conflicts of interest regarding the real property economic interests of each planning commissioner.

³ Although your letter of March 23, 2007, states that Commissioner Jones owns property in both District's One and Two, in our telephone conversation of March 24, 2007, you stated that the information in the letter was incorrect, and Commissioner Jones owns property only in District One.

The County proposes to develop a segmentation district protocol in accordance with Regulation 18709. You have provided E-size county GPS maps and a CD containing the same information showing the locations of the properties each of the planning commission members owns. For each of the properties owned, the maps show an "abstention area" for each committee or board member, which consists of the area within 500 feet of the boundaries of the property the particular member owns.

The course of review you propose for the general plan update before both the planning commission and the board of supervisors would be as follows. Once the General Plan Revision agenda item is called, the public hearing will be opened. County staff (including the County's consultant) will begin with a presentation of the current draft of the proposed General Plan, including the environmental impact report accompanying the draft. At the planning commission level, this will be the draft developed by the Tehama County General Plan Revision Advisory Committee; at the board of supervisor's level, this will be the draft recommended for approval by the planning commission. Commission and board members may ask questions, but will not be expected (or encouraged) to express any opinion at that time.

Once staff's presentation has concluded, the public testimony portion of the hearing will be opened, and members of the public may speak and present evidence, argument, and opinion regarding the general plan revision and may propose changes to the draft of the proposed general plan. As with staff's presentation, commission and board members may ask questions during this portion of the proceeding, but will not be expected (or encouraged) to express any opinion. It is anticipated that the planning commission will hold multiple public hearings in various parts of the County, before holding a final public hearing at the County seat. These initial public hearings will end once the public testimony has concluded.

Once the public portion of the hearing is over, County staff will present any closing comments and will answer any final questions for commission or board members. At this point, the actual deliberations will begin. First, the abstention areas for each member of the commission or board will be identified. The members will be asked if any of them would like to propose any change to any land use designation set forth in the draft general plan within any of the abstention areas (other than their own). If so, the affected member will step off the dais and leave the room. The proposed change will then be discussed, deliberated, and voted upon by the remaining members. Once this process is complete, the affected member will return to the dais.

When there are no more proposed changes to any abstention area, the members will be asked if they would like to propose any change to any land use designation set forth in the draft general plan outside the abstention areas. Any such proposals will be discussed, deliberated, and voted upon by all members. The commissioners and board members will be asked if they would like to propose any change to the text of the goals, policies, and implementation measures set forth in the draft general plan document. Any

such proposals will be discussed, deliberated, and voted upon by all members. Once all votes are complete, the public hearing will be formally closed.

After the public hearing is closed, all members will vote first upon the approval or disapproval of the entire Final Environmental Impact Report, with any amendments necessitated by changes to the land use designations and goals, policies, and implementation measures. All members will then vote upon the approval or disapproval of the entire proposed general plan, as possibly amended by the various changes described above.

ANALYSIS

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 interest of persons who have supported them. (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.

A public official has a "financial interest" in a governmental decision, within the meaning of the Act, when 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).) In order to determine whether a public official has a disqualifying conflict of interest in a given governmental decision, the Commission has adopted an eight-step analytical framework. (Regulation 18700(b)(1)-(8).) 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.)

Step One: Are the Members of the Boards of Supervisors and the Planning Commission Public Officials?

The Act's conflict-of-interest provisions apply only to "public officials." (Section 87100.) A "public official" is "every member, officer, employee, or consultant of a state or local government agency" (Section 82048, Regulation 18701.) Members of the Tehama County Board of Supervisors and the Planning Commission are public officials within the meaning of the Act.⁴

⁴ If a public official's office is listed in Section 87200 ("87200 filers" include city council members) 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.)

Step Two: Will the Members of the Board of Supervisors and Planning Commission be Making, Participating in Making, or Influencing a Governmental Decision?

A public official “makes a governmental decision” when the official, acting within the purview 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 he or she, without substantive review, negotiates, advises, or makes recommendations regarding a decision. (Regulation 18702.2.)⁵ A public official is “influencing a governmental decision” if he or she contacts, or appears before, or otherwise attempts to influence any member, officer, employee, or consultant of the County regarding the decisions. (Regulation 18702.3.)

The members of the board of supervisors and planning commission will be called upon to consider whether the County should approve or disapprove amendment to the County’s general plan. Therefore, they will be making, participating in making, or otherwise using their official positions to influence a governmental decision.

Step Three: What are the Economic Interests—The Possible Sources of Conflict of Interest for the Public Officials?

A public official has a “financial interest” in a governmental decision if it is reasonably foreseeable that the decision will have 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. (Section 87103; regulations 18703-18703.5.) The applicable economic interests include:

- 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 (Section 87103(b); Regulation 18703.2);

⁵ Exception: making or participating in a governmental decision does not include appearances by a public official as a member of the general public before an agency in the course of its prescribed governmental function to represent himself or herself on matters related solely to the official’s wholly owned real property or business entity. (See Regulation 18702.4)

- an economic interest in any source of income, including promised income that 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 \$390 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 expenses, income, assets, or liabilities, as well as those of his or her immediate family. This is also known as the “personal financial effects” rule. (Section 87103, Regulation 18703.5.)

Indirect investment or interest means any investment or interest owned by a business entity in which the official owns directly, indirectly, or beneficially a 10-percent interest or greater. (Section 87103(e).)

Each of the supervisors and planning commission members own real property within the County. Accordingly, each has an economic interest in the real property he or she owns. Because your question concerns only the real property economic interests of the public officials identified, and you have not provided any facts concerning other possible economic interests, our analysis is limited to the real property interests you have identified.

Step Four: Are the Officials’ Economic Interests Directly or Indirectly Involved in the Governmental Decision?

Real property in which a public official has an economic interest is considered directly involved if any of the following apply:

- The property is located within 500 feet of the boundaries of the property that is the subject of the governmental decision. (Regulation 18704.2(a)(1).)
- The governmental decision involves a zoning or rezoning, annexation or de-annexation, 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. (Regulation 18704.2(a)(2).)
- The governmental decision involves the issuance, denial, or revocation of a license, permit or other land use entitlement authorizing a specific use of the real property in which the official has an interest. (Regulation 18704.2(a)(3).)

- 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. (Regulation 18704.2(a)(4).)
- 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. (Regulation 18704.2(a)(5).)
- 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)(6).)

Real property that is not directly involved in a governmental decision is considered indirectly involved. Accordingly, each of the real property economic interests of the public officials identified herein is either directly or indirectly involved as follows

Board of Supervisors

Gregg Avila – District One: Supervisor Avila owns two parcels in the County: his residence in District One and another parcel in District Two. His residence in District One is located within an incorporated city, and no portion of this property is located within 500 feet of the boundaries of any property that is the subject of the governmental decisions. Therefore, the parcel on which his residence is located is indirectly involved in the decisions. The parcel he owns in District Two is directly involved.

George Russell – District Two: Supervisor Russell's real property is located within an incorporated city, and no portion of his property is within 500 feet of the boundaries of any property that is the subject of the governmental decisions. Therefore, his real property economic interest is indirectly involved in the governmental decisions.

Charles Willard – District Three: Supervisor Willard owns real property in his district. The property is located within 500 feet of the boundaries of the property that is the subject of the governmental decision. Therefore, Supervisor Willard's real property economic interest is directly involved in the governmental decision.

Robert Williams – District Four: Supervisor Williams owns real property in his district. The property is located within 500 feet of the boundaries of the property that is the subject of the governmental decision. Therefore, Supervisor Willard's real property economic interest is directly involved in the governmental decision.

Ron Warner – District Five: Supervisor Warner’s real property is located within an incorporated city, and no portion of his property is within 500 feet of the boundaries of any property that is the subject of the government decisions. Therefore, his real property economic interest is indirectly involved in the governmental decisions.

Planning Commission

Don Jones – District One: Commissioner Jones owns real property in his district. The property is located within 500 feet of the boundaries of the property that is the subject of the governmental decision. Therefore, Commissioner Jones’s real property economic interest is directly involved in the governmental decision.

Linda Walker – District Two: Commissioner Walker owns real property in her district. The property is located within 500 feet of the boundaries of the property that is the subject of the governmental decision. Therefore, Commissioner Walker’s real property economic interest is directly involved in the governmental decision.

Kim Tipton – District Three: Commissioner Tipton owns real property in both Districts One and Two. Both properties are located within 500 feet of the boundaries of the property that is the subject of the governmental decision. Therefore, both of Commissioner Tipton’s real property economic interests are directly involved in the governmental decision.

William Turri – District Four: Commissioner Turri owns real property in his district. The property is located within 500 feet of the boundaries of the property that is the subject of the governmental decision. Therefore, Commissioner Turri’s real property economic interest is directly involved in the governmental decision.

Delbert David – District Five: Commissioner David’s real property is located within an incorporated city, and no portion of his property is within 500 feet of the boundaries of any property that is the subject of the governmental decisions. Therefore, his real property economic interest is indirectly involved in the governmental decisions.

You have stated that the decision will involve two parts: the public hearing phase and the decision, or voting, phase. With respect to the public hearing phase, each of the supervisors and commissioners will be participating in the process. Regulation 18704.2(b)(3) 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:

{...}

“(3) The decision solely concerns the adoption or amendment of a general plan and all of the following apply:

“(A) The decision only identifies planning objectives or is otherwise exclusively one of policy. A decision will not qualify under this subdivision if the decision is initiated by the public official, by a person that is an economic interest of the public official, or by a person representing either the public official or an economic interest of the public official.

“(B) The decision requires a further decision or decisions by the public official’s agency prior to implementing the planning or policy objectives. Examples of further decisions include, but are not limited to, permitting, licensing, rezoning, or the approval of or change to a zoning variance, land use ordinance, or specific plan or its equivalent.

“(C) The decision does not concern an identifiable parcel or parcels or development project. A decision does not “concern an identifiable parcel or parcels” solely because, in the proceeding before the agency in which the decision is made, the parcel or parcels are merely included in an area depicted on a map or diagram offered in connection with the decision, provided that the map or diagram depicts all parcels located within the agency’s jurisdiction and economic interests of the official are not singled out.

“(D) The decision does not concern the agency’s prior, concurrent, or subsequent approval of, or change to, a permit, license, zoning designation, zoning variance, land use ordinance, or specific plan or its equivalent.”

Under this exception, each of the supervisor’s and commissioner’s real property economic interests would appear to be indirectly involved in this part of the governmental decision, as long as the discussion does not involve an “identifiable parcel or parcels.” In other words, as long as the discussion does not specifically concern any of the properties with boundaries located within 500 feet of the real property economic interest of one of the supervisors or commissioners. If it does, the exception would not be applicable, and the real property of any official located within 500 feet of the “identifiable parcel or parcels” would still be directly involved in that part of the decision and that official would have to follow the procedures set forth in Regulation 18702.5.

Step Five: What Are the Applicable Materiality Standards?

Regulation 18705.2(a)(1) provides that the financial effect of a governmental decision on real property that is directly involved in the governmental decision is presumed to be material. Pursuant to the regulation, this presumption may be rebutted by proof that it is not reasonably foreseeable that the governmental decision will have any financial effect, not even a “penny’s worth,” on the real property. This is known as the “one penny rule.”

Regulation 18705.1(b)(1) states that the financial effect of a governmental decision on real property that is indirectly involved in the governmental decision is presumed not to be material. This presumption can be rebutted by proof that there are specific circumstances regarding the governmental decision, its financial effect, and the nature of the real property in which the public official has an economic interest, that make

it reasonably foreseeable that the decision will have a material financial effect on the real property in which the public official has an interest. You have provided no facts indicating whether there are specific circumstances regarding these decisions that may rebut the presumption of nonmateriality. Accordingly, our analysis will assume none exist.

Step Six: Reasonable Foreseeability

Whether the financial consequences of a decision are reasonably foreseeable at the time a governmental decision is made depends on the facts of each particular case. 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.*) Please note that the Commission does not act as a finder of fact when providing advice. (*In re Oglesby, supra*, 1 FPPC Ops. 71.)

Given the facts you have presented along with the applicable materiality standard, if the decision regarding the land designations on the properties within 500 feet of the official's directly involved economic interest would result in a financial effect of even a penny, the official would have a disqualifying conflict of interest. Accordingly, Supervisors Avila, Willard, and Williams and Commissioners Jones, Walker, Tipton, and Turri have a prohibited conflict of interest and may not participate in the decision to adopt the general plan amendments unless an exception applies.⁶

Segmentation

You have specifically asked if the exception allowing for segmentation of a governmental decision provided in Regulation 18709 applies, and you have outlined a procedure by which you propose to segment the various portions of the decisions involving land use designations for properties with boundaries located within 500 feet of the real property economic interest of the various officials (the directly involved properties). Regulation 18709 states:

"(a) 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;

⁶ As stated above, they will be able to participate in the public hearing phase of the decision if the exception for general plan amendments under Regulation 18704.2(b)(3)(A)-(D) applies.

“(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

“(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.

“(b) For purposes of this regulation, decisions are “inextricably interrelated” when the result of one decision will effectively determine, affirm, nullify, or alter the result of another decision.

“(c) Budget Decisions and General Plan Adoption or Amendment Decisions Affecting an Entire Jurisdiction: Once all the separate decisions related to a budget or general plan affecting the entire jurisdiction have been finalized, the public official may participate in the final vote to adopt or reject the agency’s budget or to adopt, reject, or amend the general plan.”

Under the facts you have presented, you have outlined a procedure to be used once the actual deliberations begin. Under this procedure, you propose to segment any decisions affecting specific “abstention areas” (the property within 500 feet of a given official’s real property economic interest) from the overall general plan decision. Each decision affecting an abstention area will be considered before the decision to adopt the general plan, with each member leaving the room and not participating in any discussion or decision affecting the designated abstention area for which he or she has a conflict of interest. Once all the decisions affecting the abstention areas have been resolved, the full body will consider the decision to adopt the overall general plan.

Regulation 18709(a)(3) provides, as one of the conditions for segmenting a decision, that the decision in which an official has a financial interest be considered first. However, because the number of potential conflicts presented here, involving three members of the board of supervisors and four members of the planning commission, will result in multiple segmented decisions, not all of these segmented decisions can be considered “first” in the ordinal sense. On the other hand, there does not appear to be much rationale for allowing only one of the decisions (for each body) to be segmented, nor do we have a method to resolve how that might be determined.

Accordingly, we interpret the word “first” to mean that the segmented decision (the one in which the official has a financial interest) must be considered, and a final decision reached, “before” the overall decision from which it was segmented. When there is more than one segmented decisions, each must additionally be determined in an order that would prevent one decision from

determining or altering the result of one of the other segmented decisions, and each of the decisions must comply with the conditions set forth in Regulation 18709.

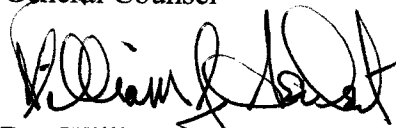
Steps Seven and Eight: Public Generally and Legally Required Participation

You have not presented any facts indicating that the “public generally” exception may apply, and under the analysis presented above, the “legally required participation” exception would not be necessary.

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

Sincerely,

Scott Hallabrin
General Counsel

A handwritten signature in black ink, appearing to read "William J. Lenkeit", written over the printed name below.

By: William J. Lenkeit
Senior Counsel, Legal Division

WL:jgl