



FAIR POLITICAL PRACTICES COMMISSION

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November 12, 2007

Karl Drexel
Tomales Village Community Services District
P.O. Box 303
Tomales, California 94971

Re: Your Request for Informal Assistance
Our File No. I-07-164

Dear Mr. Drexel:

This letter responds to your request for advice on behalf of Tomales Village Community Services District President Nicole Vigeant regarding the conflict-of-interest provisions of the Political Reform Act (the "Act")¹ 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. For advice relating to whether or not the issues herein may implicate the provisions of Government Code Section 1090, we strongly recommend that you contact your local counsel or the State Attorney General's office.

Because your letter seeks general information and does not identify any specific governmental decision, we are treating it as a request for informal assistance.²

QUESTION

Is the board president of a community services district prohibited from participating in governmental decisions relating to the renovation of a community park where her husband has been hired as the contractor for the park renovation project and is a bidder on some parts of the project?

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

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).

CONCLUSION

Yes. The board president is prohibited from participating in any governmental decisions relating to the park project if the decision will have a reasonably foreseeable financial effect on her. You have not delineated any specific governmental decisions, but those decisions that financially affect Boardmember Vigeant's husband's company will likely have a reasonable foreseeable financial effect on her, as discussed below.

FACTS

The Tomales Village Community Services District (the "District") is a community services district established in 1998 under Government Code Section 61000. The District has a five member elected board of directors. Nicole Vigeant is the president of the board of directors for the District. The District is responsible for the wastewater treatment plant and the community park. The District has embarked on a renovation project for the community park. The board of directors passed a resolution to split the project into various functions and bid them separately and another resolution authorizing the administrator to contract on the open market for labor, material, and supplies pursuant to "Public Contract Code Sections 20166, 20167, 20682, and 20685." Based on that authority, you hired a contractor, who is married to the president of the board, to oversee the project and to actually bid some of the project.

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 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.

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: IS BOARDMEMBER VIGEANT A PUBLIC OFFICIAL?

The conflict-of-interest provisions of the Act only apply to public officials. (Section 87100.) Public officials include members of committees, boards or commissions with decision making authority. (Regulation 18701(a)(1).) Officials of all special purpose districts are also included under the provisions of the rule. As a member of the Tomales Village Community Services District Boardmember Vigeant is public official under the Act.

STEP TWO: WILL BOARDMEMBER VIGEANT BE MAKING, PARTICIPATING IN MAKING, OR INFLUENCING A GOVERNMENTAL DECISION?

As the president of the District, Boardmember Vigeant will be called upon to participate in the District's decisions affecting the park renovation process and to vote on the District's positions or recommendations that pertain to the park project. Therefore, she will be making, participating in making, or otherwise using her official position to influence a governmental decision.

Note that when a public official who holds an office specified in Section 87200 and has a conflict of interest in a decision, under certain circumstances he or she must: (1) orally identify each type of economic interest involved in the decision as well as details of the economic interest; (2) recuse himself or herself; and (3) leave the room. Members of the Tomales Village Community Services District are not subject to the rule in the statute (although the Board's own rules may impose similar requirements).

STEP THREE: WHAT ARE BOARDMEMBER VIGEANT'S ECONOMIC INTERESTS?

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); Reg. 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); Reg. 18703.2);
- 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); Reg. 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); Reg. 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; Reg. 18703.5).

Indirect investment means any investment owned by the spouse or dependant child of a public official. From the brief facts you have given, it appears that Boardmember Vigeant has an economic interest in her husband's business, if his ownership interest is worth \$2,000 or more, as well as an economic interest in the business as a source of income to her if she has received \$500 or more as her community property share of income within 12 months preceeding the governmental decision.³

You have not indicated any other potential economic interests. Consequently, our analysis is limited to her economic interests as set forth above.

STEP FOUR: ARE BOARDMEMBER VIGEANT'S ECONOMIC INTERESTS 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, the official must first determine if his or her economic interest is directly involved or indirectly involved in the governmental decision." (Regulation 18704(a).)

Regulation 18704.1(a) states:

"a) A person, including business entities, sources of income, and sources of gifts, 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 decision before 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."

You have not provided any facts relating to a specific decision so that we may determine whether or not Boardmember Vigeant's husband's business is directly involved

³ The personal financial effects rule under Regulation 18703.5 does not apply here because any effect on Boardmember Vigeant's personal finances resulting from her indirect interest in the business entity would be excluded under Regulation 18705.5(a).

in that governmental decisions. By way of example, where a decision pertains to the contracting business, such as decisions on the actual contract with the business, the business will be directly involved in the decision.

Conversely, decisions affecting the project, but not involving the business may only indirectly affect the business. (See Regulation 18704.1(b).)

Obviously, which rule applies depends on the specific facts of a specific decision.

STEP FIVE: WHAT IS THE APPLICABLE MATERIALITY STANDARD?

For directly involved business entities that are sources of income, any reasonably foreseeable financial effect is deemed material.

For indirectly involved economic interests that are business entities or sources of income that are business entities, the materiality standards set forth in Regulation 18705.1(c) apply.

Regulation 18705.1(c) sets forth the materiality standard pertinent to an economic interest that is a business entity and is *indirectly involved* in the decision. For relatively small business entities⁴, the materiality standard set forth in regulation 18705.1(c)(4) applies:

“(c) Indirectly involved business entities. The following materiality standards apply when a business entity in which a public official has an economic interest is indirectly involved in a governmental decision. If more than one of the following subdivisions is applicable to the business entity in question, apply the subdivision with the highest dollar thresholds.

{...}

(4) If the business entity is not covered by subdivisions (c)(1)-(3), the financial effect of a governmental decision on the business entity is material if it is reasonably foreseeable that:

(A) The governmental decision will result in an increase or decrease in the business entity's gross revenues for a fiscal year in the amount of \$20,000 or more; or,

(B) The governmental decision will result in the business entity incurring or avoiding additional expenses or reducing or eliminating existing expenses for a fiscal year in the amount of \$5,000 or more; or,

⁴ Because you have not provided any information regarding the size of the business entity, for purposes of example only, we are assuming that the business falls under the criteria identified herein. You should examine the entire regulation cited to determine which materiality standard applies, based on the size of the business.

(C) The governmental decision will result in an increase or decrease in the value of the business entity's assets or liabilities of \$20,000 or more."

If the financial effect of the decision on the business meets any of the thresholds identified above, it is considered material.

STEP SIX: IS IT REASONABLY FORESEEABLE THAT THE FINANCIAL EFFECT OF THE GOVERNMENTAL DECISION UPON BOARDMEMBER VIGEANT'S ECONOMIC INTERESTS WILL MEET THE APPLICABLE MATERIALITY STANDARD?

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.)

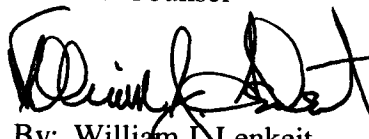
STEPS SEVEN AND EIGHT: PUBLIC GENERALLY & LEGALLY REQUIRED PARTICIPATION

You have not presented any facts indicating that either the "public generally" or "legally required participation" exceptions would be applicable herein. Accordingly, we have not provided an analysis involving those steps.

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

WJL:jgl