



FAIR POLITICAL PRACTICES COMMISSION

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September 24, 2008

Steven A. Amerikaner
Brownstein Hyatt Farber Schreck
21 East Carillo Street
Santa Barbara, CA 93101-2706

Re: Your Request for Advice
Our File No. A-08-153

Dear Mr. Amerikaner:

This letter responds to your request for advice on behalf of Craig Geyer, a member of the board of directors for the Goleta West Sanitary District (the "District"), regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").¹ 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. Nothing in this letter should be construed to evaluate any conduct that may have already taken place, and any conclusions contained in this letter apply only to prospective actions.

QUESTION

May Director Geyer take part in a decision by the District to replace or rehabilitate sewer lines despite his plumbing business and real property owned by the business within 500 feet of the property subject to the governmental decision?

CONCLUSION

Because the District's decision is more than a decision to repair, replace, or maintain the existing sewer line, and the property is within 500 feet of the property subject to the governmental decision, Director Geyer's economic interest in real property is directly involved in the decision to replace or rehabilitate the sewer line. The financial effect on this economic interest in real property is presumed to be material. Accordingly,

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.

Director Geyer may not make, participate in making, or influence the decision unless he can rebut the presumption by showing that it is not reasonably foreseeable the governmental decision will have *any* financial effect on his real property, and he also determines that there will be *no* reasonably foreseeable material financial effects on his other economic interests.

FACTS

Director Geyer is the owner of a plumbing business known as Central Service and Supply. This business owns and occupies property located on Pardall Road in Isla Vista, which is within the boundaries of the District. Director Geyer's ownership interest in his business is worth more than \$2,000 and the real property on which the business is located is also worth more than \$2,000. This property is located within the boundaries of the Isla Vista Redevelopment Plan Area, and the Santa Barbara County Redevelopment Agency is planning public right-of-way improvements that include planting a row of trees on each side of Pardall Road within 500 feet of the property.

Because the planned row of trees is close to two existing sewer lines, the District has secured a report, dated April 29, 2008, from its engineer on options for protecting the two sewer lines from damage by root intrusion caused by the new trees. The report analyzes six different options including replacing the existing pipelines with a larger size. The report also recommends that the District rehabilitate one of the two sewer lines to reduce the risk of root intrusion.

According to the District's General Manager, if the District's board approves this recommendation, one of the sewer lines would be rehabilitated by means of a "Cured-in-Place Pipeline." While this rehabilitation does not enlarge or lengthen the sewer line, the rehabilitation will improve the pipeline's susceptibility to root intrusion and extend the pipeline's useful life.

ANALYSIS

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, if it is reasonably foreseeable that the decision will have a material financial effect on one or more of the public official's economic interests. (Section 87103; Regulation 18700(a).) The Commission has adopted an eight-step standard analysis for deciding whether an individual has a disqualifying conflict of interest in a given governmental decision, which we apply to your question. (Regulation 18700(b)(1)-(8).)

Step One: Is Director Geyer a public official?

The Act's conflict-of-interest provisions apply only to "public officials." (Sections 87100, 87103; Regulation 18700(b)(1).) A "public official" is "every member, officer, employee or consultant of a state or local government agency" (Section 82048.) As a member of the District's board, Director Geyer is a public official within the meaning of the Act.

Step Two: Is Director Geyer making, participating in making, or influencing 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, 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 a governmental decision" when, acting within the authority of his or her position and without significant intervening substantive review, the official negotiates, advises, or makes recommendations to the decisionmaker regarding the governmental decision. (Regulation 18702.2.) A public official is attempting 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.) As a member of the District's board, Director Geyer is making, participating in making, or influencing a governmental decision when taking part in a decision by the District to rehabilitate or replace the sewer lines.

Step Three: What are Director Geyer's economic interests?

Of the economic interests recognized under the Act², those interests implicated by your account of the facts are the following:

Real Property -- A public official has 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.)

Business Entity -- A public official has an economic interest in a business entity in which he or she has a direct or indirect investment of \$2,000 or more, or in which he or she is a director, officer, partner, trustee, employee, or holds any position of management. (Section 87103(a) and (d); Regulations 18703.1(a) and (b).)

Sources of Income -- A public official has an economic interest in any source of income, including promised income, which aggregates to \$500 or more within 12 months prior to the decision. (Section 87103(c); Regulation 18703.3.) "Income" is defined to

² Our analysis is limited to the economic interest you have identified.

include a pro rata share of the income of any business entity or trust in which the official (or his or her spouse) owns directly, indirectly, or beneficially, a 10-percent or greater interest. (Section 82030(a).)

Personal Financial Effects -- A public official has an economic interest in his or her personal finances, including those of his or her immediate family. This is known as the "personal financial effects" rule. (Section 87103; Regulation 18703.5.)

Real Property:

Director Geyer's plumbing business owns and occupies property in Isla Vista on Pardall Road, which is within the boundaries of the District. From the facts presented, Director Geyer's interest in this property is \$2,000 or more. Accordingly, Director Geyer has an economic interest in this real property. (Section 87103(b).)

Plumbing Business:

Director Geyer is also the owner of a plumbing business know as Central Service and Supply. From the facts presented, Director Geyer's has an investment of \$2,000 or more in this business and is a director, officer, partner, trustee, employee, or manager of the business. Therefore, Director Geyer has an economic interest in the plumbing business as a business entity. (Section 87103 (a) and (d).) Moreover, if Director Geyer has received income of \$500 or more from the plumbing business in the 12 months prior to the District's decision, Director Geyer also has an economic interest in the plumbing business as a source of income. (Section 87102(c).)

Plumbing Business Customers:

Director Geyer may also have economic interests in customers of his plumbing business as sources of income. Under section 82030(a), if a public official owns a 10-percent interest or greater in a business, customers who are sources of income to that business are also considered sources of income to the public official.³

Personal Finances:

A public official always has an economic interest in his or her personal finances. A governmental decision will have an effect on this economic interest if the decision will

³ Because you have not identified any particular customers of Director Geyer's plumbing business, we cannot analyze any potential conflicts of interest Director Geyer may have in a decision affecting the customers. Moreover, in light of our conclusion that the financial effect on Director Geyer's economic interest in real property disqualifies him from participating in the governmental decision, we find it unnecessary to further consider any economic interests in customers of his business. If Director Geyer has questions related to any economic interests in a customer of his business, it is advisable that he request further assistance providing all relevant facts.

result in the personal expenses, income, assets, or liabilities of the official or his or her immediate family increasing or decreasing. (Section 87103; Regulation 18703.5.)⁴

Step Four: Are Director Geyer's economic interests directly or indirectly involved in the decision?

Real Property:

The Act's conflict-of-interest rules distinguish between economic interests that are directly involved in governmental decisions and those that are not directly involved. In pertinent part, Regulation 18704.2(a)(1) provides that the real property in which the official has an interest is directly involved in a governmental decision if any part of the property lies within 500 feet of the property that is the subject of the decision. Additionally, the real property is directly involved in a decision if the decision involves the 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).) Because Director Geyer's property is within 500 feet of the property subject to the governmental decision, and the decision will entail possible improvements to the sewer line, his real property interest is directly involved in the governmental decision to rehabilitate or replace the line.⁵

Plumbing Business:

Regulation 18704.1(a) states that a business entity or source of income is directly involved in a decision before the official's agency when that business entity or source of income, 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

⁴ A financial effect on the value of real property owned directly or indirectly by a public official, and a financial effect on the gross revenues, expenses, or value of assets and liabilities of a business entity in which a public official has a direct or indirect investment interest, are not considered separate financial effects on the official's personal finances and would not be analyzed separately under the “personal financial effects” rule. (Regulation 18705.5(a).) Accordingly, the personal financial effects rule does not appear to apply to Director Geyer's circumstances and we will not discuss it further.

⁵ Notwithstanding Regulation 18704.2(a), an economic interests in real property is not directly involved in a governmental decision, but is indirectly involved if “[t]he decision solely concerns repairs, replacement, or maintenance of existing streets, water, sewer, storm drainage or similar facilities.” (Regulation 18704.2(b)(2).) However, under the facts presented the District will consider replacing the sewer line with larger size line. Accordingly, the decision faced by the District does not solely concern the repair, replacement, or maintenance of an existing line and falls outside of this exception.

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.”

Business entities and sources of income that are *not* directly involved in governmental decisions are regarded as *indirectly* involved. (Regulations 18704.1(b), 18705.1(a)(2), and Regulation 18705.3(b).) From the facts provided, Director Geyer’s plumbing business does not appear to have initiated the proceeding, or be party in, or subject of, the proceeding within the meaning of Regulation 18704.1. Accordingly, it appears as though Director Geyer’s economic interests in the business as a business entity and as a source of income are indirectly involved in the government decision.

Steps Five and Six: Will there be a reasonably foreseeable material financial effect on Director Geyer’s economic interest(s)?

Materiality

Having identified the economic interests involved, and determined whether each interest is directly or indirectly involved in the decision at issue, it is necessary to identify the materiality standard appropriate to each economic interest.

Real Property:

Any financial effect of a governmental decision on real property directly involved in the governmental decision is presumed to be material. (Regulation 18705.2(a)(1).) 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.*) However, the size of the financial effect does not matter. If there is *any* financial effect at all, even “one-penny,” that effect is presumed to be “material.”

Plumbing Business:

For economic interests in business entities *indirectly* involved in a decision, including business entities, which are a source of income to an official, the materiality standard is given at Regulation 18705.1(c).

The thresholds for materiality under this regulation vary with the size of the business. While we do not know the size of Director Geyer’s business, Regulation 18705.1(c)(4) provides that the financial effect of a governmental decision on a business, not publicly traded and relatively modest in economic size, 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,

“(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.”

However, Director Geyer should consult Regulation 18705.1(c) to ensure that he identifies the materiality threshold actually appropriate to his plumbing business.

Foreseeability

Once a public official has determined the materiality standard applicable to each of his or her economic interests, the next step is determining whether it is “reasonably foreseeable” that the standard will be met. A material financial effect on an economic interest is “reasonably foreseeable” if it is substantially likely that one or more of the materiality standards will be met as a result of the governmental decision. (Regulation 18706(a).) An 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.)

Ultimately, whether a material financial effect is foreseeable at the time a decision is made depends on facts and circumstances peculiar to each case. (*In re Thorner, supra*, at 198.) Because the Commission does not act as a finder of fact in providing advice (*In re Oglesby* (1975) 1 FPPC Ops. 71), the foreseeability of a particular financial effect is a determination that must be left, in most instances, to the informed judgment of the public official.

Accordingly, the Commission cannot determine what financial effect the decision may have on Director Geyer’s economic interest in his plumbing business. Because the Commission is not a finder of fact, the determination of whether the decision regarding the sewer line will have a reasonably foreseeable material financial effect on Director Geyer’s business must be left up to the Director Geyer.

However, your facts have indicated a reasonably foreseeable financial effect on Director Geyer’s economic interests in real property. As previously addressed, the financial effect on Director Geyer’s economic interest in real property is presumed to be material, as the property is within 500 feet of the property subject to the governmental decision and will receive new or improved sewer facilities. Accordingly, Director Geyer may not make, participate, or influence the decision to rehabilitate or replace the sewer

line unless he can rebut the presumption of materiality by showing that it is not reasonably foreseeable the governmental decision will have *any* financial effect on his real property. (See Regulation 18705.2(a)(1).) Also, he would have to further determine that there will be *no* reasonably foreseeable material financial effects on his other economic interests, including his economic interests in his plumbing business or customers of the business.

Steps Seven and Eight: Does this governmental decision come within any exception to the conflict-of-interest rules?

Public Generally & Legally Required Participation

Even if an official has a conflict of interest, disqualification is not required if the governmental decision affects the public official's economic interests in a manner that is indistinguishable from the manner in which the decision will affect the public generally. (Section 87103; Regulation 18707(a).)

Additionally, in certain rare circumstances, a public official may be called upon to take part in a decision despite the fact that the official may have a disqualifying conflict of interest under the "legally required participation" exception. This exception applies only in certain very specific circumstances where the government agency would be paralyzed from acting. (Section 87101; Regulation 18708.)

You have not presented any facts indicating that the "public generally" or the "legally required participation" exceptions are applicable to Director Geyer's circumstances, so we will not address them further.

Segmentation

Under the facts you have submitted, you have presented the governmental decision as a single decision at which six options may be considered. At this time, there is no indication as to whether the decision regarding the sewer line can be segmented. However, we note that in some circumstances it may be possible to segment the decision into separate decisions so long as the decisions are not "inextricably interrelated." The Commission has advised that "[u]nder certain circumstances, a public official disqualified from one decision may participate in other related decisions provided that the official's participation does not affect the decision in which he or she has a conflict of interest." (*In re Owen* (1976) 2 FPPC Ops. 77.)

Regulation 18709 provides the rules for the "segmentation" of a governmental decision:

"(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;

“(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.”⁶

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

Sincerely,

Scott Hallabrin
General Counsel



By: Brian G. Lau
Counsel, Legal Division

BGL:jgl

⁶ Because you have not identified all six options that may be considered by the District, we cannot determine whether it may be possible to segment the decision regarding the sewer line at this time. If additional facts indicate a possibility of segmenting the decision, Director Geyer should seek further advice providing all relevant facts.