



FAIR POLITICAL PRACTICES COMMISSION

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June 24, 2009

Steven S. Lucas
Nielsen, Merksamer
Parrinello, Mueller & Naylor, LLP
2350 Kerner Blvd, Suite 250
San Rafael, CA 94901

Re: Your Request for Advice
Our File No. A-09-122

Dear Mr. Lucas:

This letter is in response to your request on behalf of California Fish and Game Commissioner Michael Sutton for advice regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").¹ This letter is based solely on the facts presented; the Fair Political Practices Commission does not act as a finder of fact when it renders advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) Nothing in this letter may be construed to evaluate any conduct that has already taken place. Please bear in mind also that our advice is limited to obligations arising under the Act. We do not address the application, if any, of other conflict-of-interest laws such as common law conflict of interest or Government Code Section 1090.

QUESTION

Does the Act prohibit Commissioner Sutton's participation in upcoming decisions by the California Fish and Game Commission relating to Marine Protected Areas for the North Coast region, if it is not reasonably foreseeable that these decisions will have any financial effect on the Monterey Bay Aquarium or on Commissioner Sutton himself?

CONCLUSION

There is a nexus between Commissioner Sutton's private and public obligations in the governmental decisions at issue. The Act therefore permits his participation in these

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.

decisions only if it is not reasonably foreseeable that they will have any financial effect on the Aquarium or on Commissioner Sutton's own personal finances. Assuming that your account of the facts correctly states that there are no such reasonably foreseeable financial effects, the Act will not bar his participation in these decisions.

FACTS

Michael Sutton is a Commissioner on the California Fish and Game Commission ("FGC"). He is also a vice president of the Monterey Bay Aquarium Foundation ("Aquarium") and is the Director of its Center for the Future of the Oceans ("CFFO"). The Aquarium is a California non-profit corporation organized under Internal Revenue Code section 501(c)(3), with annual revenues ranging, in recent years, from a low of \$55.4 million to a high of \$94.6 million.

CFFO was created as a division of the Aquarium to consolidate into a single division the Aquarium's marine policy and advocacy arms and to expand the Aquarium's efforts to "inspire action for conservation of the ocean." CFFO "aim[s] to empower individuals, influence policy and contribute to the protection of the oceans for future generations," and has five areas of strategic focus: (1) to establish a network of marine protected areas in state and federal waters off the California coast; (2) to reform ocean governance at the national, regional, state, and local levels; (3) to harness market forces and the power of consumer choice in favor of ocean conservation through a "Sustainable Seafood Initiative;" (4) to safeguard key marine wildlife and their habitats in California waters, including sea otters, tuna, sharks, and sea turtles; and (5) to mitigate and adapt to the impacts of climate change on the ocean and coast.

As an employee of the Aquarium, Mr. Sutton receives compensation in excess of \$100,000 per year. The Aquarium does not contract with the FGC or the Department of Fish and Game ("DFG").² It has not been a party to, the subject of, and has not initiated, any proceeding before the FGC.

The Marine Life Protection Act ("MLPA," California Fish and Game Code Sections 2850 - 2863) requires that the FGC adopt a Marine Life Protection Program to improve the design and management of the state's Marine Protected Areas ("MPAs"), and a Master Plan to guide the adoption and implementation of the Program and any decisions regarding the siting of new MPAs and major modifications to existing MPAs. The MLPA requires that the Master Plan be reviewed, modified as necessary, and submitted by the DFG for consideration by the FGC.

The DFG carries out its statutory mandate through a process of public and private development of MPA proposals. When an MPA proposal is produced, it must undergo scientific and policy review before being submitted to a Regional Stakeholder Group

² The Department of Fish and Game is a state agency separate and distinct from the California Fish and Game Commission.

("RSG") composed of persons with relevant subject-matter expertise in a given study region, including fishermen, educators and conservationists. These RSGs assemble alternative MPA proposals to consider potential changes to existing MPAs within a study region, with assistance from a regional science team, the DFG, various "stakeholders" and comments from the general public. Although RSGs are the primary source of MPA proposals, other parties are permitted to submit "external" proposals. A Task Force then evaluates and forwards packages of alternative proposals for final consideration by the FGC, with recommendations on preferred alternatives. After completing its own process of public review, the FGC exercises its statutory authority to adopt, reject or amend elements of the Master Plan, regional MPA proposals, and associated CEQA issues.

Because MPAs are designed through a collaborative public process, the Aquarium has worked with the Task Force and the FGC in support of its institutional mission to "inspire conservation of the oceans." The Aquarium has actively advocated for specific MPA proposals before the Task Force, which forwards the package of alternative MPAs to the FGC, with its recommendation of preferred alternatives. The Aquarium has advocated before the FGC those MPA proposals which the Aquarium believes most effectively achieve the goals of the MLPA. However, when Mr. Sutton was appointed by Governor Schwarzenegger to serve on the FGC, the Aquarium assigned other staff to undertake the advocacy work on all matters coming before the FGC for decision, including MLPA matters. Mr. Sutton does however manage the CFFO staff performing the Aquarium's advocacy work before the FGC.

The Aquarium is financed from numerous sources including, in descending order, admissions revenues, individual charitable donations, membership dues, and grants from charitable foundations. You state that the FGC's decisions on the MPA proposals will have no reasonably foreseeable impact on the revenues that the Aquarium can anticipate from any of its revenue sources. You are aware of no reason that adoption, modification, or rejection of proposed MPAs would affect Aquarium attendance, and thus admission receipts, or would result in a greater or lesser number of members joining the Aquarium. Nor would these actions be expected to have any effect on revenue received from grants, whether from charitable organizations or individual donors. In particular, you state that it is not reasonably foreseeable that the MPAs, in whatever form they may ultimately take, would affect the quality of Aquarium exhibits. At the end of the MLPA process, you state that less than 10 percent of California's coastal waters will be off limits to collecting activities, leaving abundant resources from which the Aquarium may draw to populate its exhibits.

Moreover, you note that the expenses of the Aquarium, including staff expenses, are fixed costs set by an annual budgeting process conducted without regard to possible MPA outcomes. You see no likelihood that the Aquarium would hire more or less staff in response to any possible MPA outcomes before the FGC. MPAs already established in recent years by the FGC for the Central Coast region (where the Aquarium is situated) have had no discernable financial effect on the Aquarium's receipts or expenses.

You also state that the Aquarium supports its employees' engagement in outside public service, so long as outside responsibilities and time commitments do not adversely affect an employee's ability to fulfill his employment obligations to the Aquarium. You further indicate that Commissioner Sutton's actions and votes while sitting on the FGC will not affect the Aquarium's assessment of his continued employment or compensation.

ANALYSIS

Your request for advice presents questions under Section 87100, which prohibits a public official from making, participating in making, or using his or her official position to influence a governmental decision in which the official has a financial interest. You have provided your own legal analysis of the questions you present, recognizing that Commissioner Sutton is a public official subject to the Act's conflict-of-interest rules, and that as an FGC commissioner he will be making or participating in making governmental decisions of the FGC relating to MPAs, decisions whose outcomes the Aquarium wishes to influence through advocacy by its staff. You conclude that since Commissioner Sutton is an employee of the Aquarium, he has an economic interest in the Aquarium as a source of income to him.³ We agree with you on these fundamental points, and therefore begin our own analysis at Step Five of the Commission's eight-step analytical framework (described at Regulations 18700 – 18709), for determining when a public official has a disqualifying conflict of interest under the Act.

Step 5. What Is The Materiality Standard For Financial Effects On the Aquarium?

Your account of the facts indicates that Commissioner Sutton will supervise Aquarium personnel whose job it will be to present the Aquarium's position on MPAs before the FGC, and you have otherwise made it clear that Commissioner Sutton's duties to the Aquarium include advocacy of the Aquarium's position on these MPAs.

Regulation 18705.3(c) prescribes a specific materiality standard that must be applied in any case where there is a nexus between the duties owed to an official's private source of income and to the official's public employer.⁴

“(c) Nexus. Any reasonably foreseeable financial effect on a person who is a source of income to a public official is deemed material if the public official receives or is promised the income to achieve a goal or purpose which would be achieved, defeated, aided, or hindered by the decision.”

³ This is the only economic interest you have described to us, but we note that a public official always has an economic interest in his or her personal expenses, income, assets or liabilities, and in those of his or her spouse or dependant children. (Section 87103, Regulation 18703.5.) A reasonably foreseeable financial effect of a decision on an official's economic interest in his or her personal finances is material if it reaches \$250 or more in any twelve month period. (Regulation 18705.5.)

⁴ In your own legal analysis, you recognize that there is a “nexus” between the Commissioner Sutton's obligations to his private employer and his public responsibilities as FGC commissioner.

Thus pursuant to Regulation 18705.3(c), if the reasonably foreseeable effect of a decision includes *any* financial gain or loss to the Aquarium, however small it may be, the reasonably foreseeable financial effect on the Aquarium is deemed to be "material."

Step 6. Is it reasonably foreseeable that the decisions at issue will have a material financial effect on the Aquarium?

As defined by the Act, a public official does not have a "conflict of interest" in a governmental decision merely because his decisionmaking is guided by personal views of sound public policy, nor does he have a conflict of interest merely because these policy views are consistent with those of a private employer like the Aquarium. Rather, the Act provides that a conflict of interest exists *only* when it is reasonably foreseeable that a governmental decision will have a material *financial* effect on the official or on one of the official's economic interests, such as a private employer that is a source of income to the official. Step Six therefore requires that we determine whether it is reasonably foreseeable that a given decision will have a material financial effect on one or more of Commissioner Sutton's economic interests.

The legal analysis that accompanied your request for advice concluded that the critical question is the one we confront now – is it reasonably foreseeable that these decisions will have *some* financial effect on the Aquarium? This, in fact, is the point on which you seek guidance.

A material financial effect on an economic interest is reasonably foreseeable, within the meaning of Section 87103, if it is "substantially likely" that one or more of the materiality standards applicable to that economic interest will be met as a result of the governmental decision. (*In re Thorner* (1975) 1 FPPC Ops. 198; Regulation 18706.)

A financial effect need not be certain to be considered "reasonably foreseeable." On the other hand, if an effect is only a mere possibility, it is *not* reasonably foreseeable. (*In re Thorner, supra.*) Whether financial consequences to any entity are reasonably foreseeable at the time of a governmental decision depends on the facts of each particular case. (*Id.*) In each case, the official must look at the facts surrounding each decision to determine whether the decision is substantially likely to cause a material financial effect on the economic interest. (*Id.*)

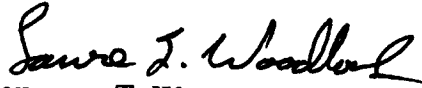
As noted earlier, the Commission cannot act as a finder of fact when it renders advice (*In re Oglesby* (1975) 1 FPPC Ops. 71). Your account of the facts, assuming it to be both accurate and complete, appears to justify your conclusion that it would not be reasonably foreseeable that the decisions you describe will have a financial effect on the Aquarium. You have also indicated that Mr. Sutton's votes as a commissioner on the FGC will not have any reasonably foreseeable effect on his employment by the Aquarium, or on the compensation paid to him by the Aquarium. We are aware of no other facts suggesting that a vote on the FGC might otherwise have any impact on his personal finances.

Thus as we understand the pertinent facts, Mr. Sutton would not have a conflict of interest, as defined by the Act, when he participates in upcoming decisions by FCG relating to MPAs for the North Coast Region. We must emphasize, however, that the determination of any decision's reasonably foreseeable financial effects must ultimately be resolved by the official himself, based on the facts reasonably available to the official at the time of each decision.⁵

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

Sincerely,

Scott Hallabrin
General Counsel



By: Lawrence T. Woodlock
Senior Counsel, Legal Division

LTW:jgl

⁵ Steps Seven and Eight consider two exceptions to disqualification from decisions that *would* have a reasonably foreseeable material financial effect on a public official's economic interests. The first is applicable in cases where the effect on the public official is not distinguishable from the effect of the decision on the public generally. (Regulation 18707.) The second exception allows participation in a decision notwithstanding a conflict of interest, when participation is legally required. (Regulation 18708.) Nothing in your account of the facts indicates that either of these exceptions would apply, so we conclude our analysis at this point.