



## FAIR POLITICAL PRACTICES COMMISSION

December 23, 1997

Fred Galante  
Deputy City Attorney  
Rutan & Tucker, LLP  
Post Office Box 1950  
Costa Mesa, California 92628-1950

**Re: Your Request for Advice**  
**Our File No. A-97-585**

Dear Mr. Galante:

This letter responds to your request on behalf of Palm Springs ("City") City Council ("Council") Member Deyna Hodges for advice about the Political Reform Act (the "Act").<sup>1</sup>

### I. QUESTIONS

A. The Agua Caliente Band of Cahuilla Indians ("Tribe") intends to expand development of a casino on land purchased from the City. May Ms. Hodges participate in Council decisions about the following matters related to the casino expansion project:

- (1) Possible environmental impacts of an expanded casino (including increases of vehicle traffic entering and exiting the casino, development of additional land, and noise increases).
- (2) Conditional use permits for increased light, noise and building height restrictions.
- (3) Architectural and building plan review.

B. May Ms. Hodges participate if the Council hears appeals made by Tribe about City decisions regarding the following issues:

- (1) Installation of a cellular telephone antenna on Tribe land.

---

<sup>1</sup> Government Code sections 81000 - 91014. Commission regulations appear at title 2, sections 18109 - 18995, of the California Code of Regulations.

- (2) Application for the development of a golf course driving range.

## II. CONCLUSION

Ms. Hodges has a disqualifying conflict of interest in Council decisions about the Tribe's casino expansion project. She does not have a conflict of interest with regard to Council decisions about the cellular telephone antenna installation or the golf course driving range development application.

## III. FACTS <sup>2</sup>

Your office represents the City as its City Attorney, and is authorized to request written advice on behalf of Ms. Hodges.

The reservation of the Tribe encompasses over 30,000 acres including much of the City, including the downtown area. Although much of the reservation has been allocated to Tribal members, the Tribe itself owns certain parcels, and is the governing entity with respect to land allocated to its members.

The relations between the Tribe and the City is complex and decisions of the Council which might affect the Tribe or its members are varied. Pursuant to an agreement between the parties, any development proposal on the land of the Tribe or its members must first be processed through the City and if the applicant is unhappy, the City's actions can be appealed to the Tribal Council who can overrule the Council. In addition, the Tribe may be involved in developing land use plans or development projects and seek input, or assistance from the City.

The Tribe purchased land from the City to develop a casino. That casino will eventually be expanded; the expansion will necessitate City review. Among the matters expected to be within the scope of this review are environment impacts, conditional use permits, and architectural and building plan review.

Ms. Hodges is an employee of a plumbing supply business. The Tribe's contractor on the casino expansion project purchased a substantial amount of supplies from the plumbing business (air conditioning equipment probably over \$20,000). Ms. Hodges did not handle the transaction and received no income from this purchase.

---

<sup>2</sup> The Commission does not act as a finder of fact when it renders advice. This advice is applicable and confers immunity (see Section 83114) only to the extent that the facts provided to us are correct and that all of the material facts have been disclosed. (*In re Oglesby* (1975) 1 FPPC Ops. 71, 77.)

## IV. ANALYSIS

### A. Introduction.

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).) 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. As a public official,<sup>3</sup> Ms. Hodges will have a disqualifying conflict of interest with regard to governmental decisions described above if the decisions will have a reasonably foreseeable and material financial effect on her financial interests which is distinguishable from the effect on the public generally.

### B. Making, participating in making, or using official position to influence governmental decisions.

The Act's conflict-of-interest provisions apply only if Ms. Hodges "make[s], participate[s] in making, or in any way attempts to use her official position to influence a governmental decision in which she knows or has reason to know she has a financial interest." (Section 87100.)

By voting on the decisions described above, Ms. Hodges would be making governmental decisions. (Regulation 18700(b)(1).) By taking part in deliberations and negotiations leading up to a vote, she would be using her official position to influence the decisions. (Regulation 18700.1(a).) Thus, the Act's conflict-of-interest rules are applicable to the situations you describe in your advice request.

Please note carefully that the Act's conflict-of-interest provisions are designed to be applied on a *decision-by-decision* basis. It is thus impossible to make an "all purpose" answer about whether Ms. Hodges has a conflict of interest with regard to Tribal matters *generally*. The conclusions in this letter are limited to the governmental decisions described in part I, above.

### C. Identifying potential financial interests.

The Act's conflict-of-interest provisions apply only to *financial* conflicts. "Financial interest" is defined, for purposes of the Act, in Section 87103. Section 87103 recognizes six kinds of potential financial interests for purposes of the Act:

---

<sup>3</sup> The Act's conflict-of-interest provisions apply only to "public officials." "Public official," for purposes of the Act, is defined to include every member, officer, employee, or consultant of a state or local agency (with certain exceptions not relevant here). (Section 82048; Regulation 87100.) As a Council Member, Ms. Hodges is a public official for purposes of the Act.

- A business entity in which the public official has an investment of \$1,000 or more;
- Real property in which the public official has an interest of \$1,000 or more;
- Any source of income which aggregates to \$250 or more within 12 months prior to the decision;
- A business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management;
- A donor of gifts to the public official if the gifts aggregate to \$290 or more within 12 months prior to the decision;
- Finally, the public official has a financial interest if the governmental decision will have a "personal effect" on him/her or his/her immediate family, whether positive or negative, of at least \$250 in any 12-month period. (This is known as the "personal effects" rule.)

(Section 87103; Regulation 18702.1(a)(4).)

Ms. Hodges has two potential financial interests at stake in the Council's decisions about the Tribe's casino expansion project. First, she is an employee of the plumbing supply business. Therefore, she will have a financial interest in the decisions *if* they result in a reasonably foreseeable and material financial effect on the plumbing supply business. (Section 87103(c), (d); see part IV.D.1, below.) Second, she will have a financial interest *if* the decisions will have personal financial effects on her or on her immediate family.<sup>4</sup> (Section 87103, first paragraph.) She will have such a financial interest if the reasonably foreseeable impact of the decisions result in the personal expenses, income, assets, or liabilities of her or her immediate family increasing or decreasing by at least \$250 in any 12-month period. (Regulation 18702.1(a)(4); see part IV.D.2, below.)

#### **D. Reasonable foreseeability and materiality**

Whether the financial consequences of a governmental decision are *reasonably foreseeable* at the time the decision is made is highly situation-specific. 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. (*In re Thorner* (1975) 1 FPPC Ops. 198.)

---

<sup>4</sup> For purposes of the Act, "immediate family" means the spouse and dependent children. (Section 82029.)

Whether a financial effect is *material* is determined under various regulations promulgated by the FPPC, depending upon the nature of the interest and the degree to which it is involved. (Regulation 18700 et seq.)

It is important to understand that determinations of reasonable foreseeability and materiality are very fact-dependent, and must be made on a decision-by-decision basis. An effect which may not be reasonably foreseeable at an early stage of a process may become reasonably foreseeable as the process unfolds.

1. The plumbing supply business.

The plumbing supply business is *indirectly involved* in the Council's decisions about the Tribe's casino expansion project.<sup>5</sup> The plumbing supply business does not appear to be involved at all in the decisions about the cellular telephone antenna, or the driving range. Therefore, the following analysis focuses on the casino expansion project.

Whether a financial effect on an indirectly involved business entity is material is determined under Regulation 18702.2. That regulation prescribes alternative rules, the applicability of which depends upon the size of the business. We assume that subsection (g) applies to the plumbing supply business. (We most strongly urge you to study Regulation 18702.2, and confirm this assumption based upon your superior access to facts about the business.) Subsection (g) provides:

"The effect of a decision is material as to a business entity in which an official has an economic interest if any of the following applies: ...

(g) For any business entity not covered by subdivisions (a), (b), (c), (d), (e) or (f):

(1) The decision will result in an increase or decrease in the gross revenues for a fiscal year of \$10,000 or more; or

(2) The 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 \$2,500 or more; or

(3) The decision will result in an increase or decrease in the value of assets or liabilities of \$10,000 or more."

Thus, the issue is whether there is a substantial likelihood that the council's decisions about the Tribe's casino expansion project will result in one of three conditions stated in subsection (g) being true as to the plumbing supply business.

---

<sup>5</sup> Regulation 18702.1(b) states the conditions in which a business entity is considered to be *directly involved* in a governmental decision. None of these conditions are true as to the plumbing supply business in connection with the Council's decisions about the Tribe's casino expansion project. Therefore, by default, Ms. Hodges' employer is indirectly involved in the decisions.

We have previously advised that a public official whose financial interests have *no previous connection* to a project may participate in decisions about the project even if he or she may *later* supply building materials to the project. (*Guinan* Advice Letter, No. A-94-047.) This is especially true if the public official's business has relatively more, rather than less, competition. (*Strauss* Advice Letter, No. A-96-034.)

Here, Ms. Hodges' financial interest does have a previous connection to the casino development project. Ms. Hodges' employer has already sold at least \$20,000 worth of equipment to the Tribe's contractor for the casino expansion project. Note that this purchase exceeds the threshold established in subsection (g)(1). The council's decisions on the casino expansion project will probably affect the local demand for equipment of the type sold by the plumbing supply business. For example, council decisions which slow or stop the casino expansion project will decrease the likelihood of a similar sale in the future.

Therefore, we conclude that a material financial effect on a local plumbing business supply is reasonably foreseeable as a result of governmental decisions on a major construction project where the plumbing supply business has already made sales to the project's general contractor in excess of the materiality thresholds in Regulation 18702.2. Ms. Hodges has a conflict of interest arising from her employer *with regard to the casino expansion project*. She is disqualified from taking part in these decisions unless the public generally exception applies. (See part IV.E., below.)

Ms. Hodges does *not* have a conflict of interest arising from her employer in the decisions about the cellular telephone antenna, or the driving range because the plumbing supply business does not appear to be even indirectly involved in these decisions.

## 2. Personal financial effects.

As explained above, Ms. Hodges will have a financial interest in the governmental decisions if the reasonably foreseeable impact of the decisions result in her personal expenses, income, assets, or liabilities or those of her immediate family increasing or decreasing by at least \$250 in any 12-month period. (Regulation 18702.1(a)(4).) You have provided no facts indicating that such an effect is reasonably foreseeable as a result of the casino expansion project decisions—apart, of course, from the effect on her employer.<sup>6</sup> Similarly, you have provided no facts indicating that such an effect is reasonably foreseeable as a result of decisions about the cellular telephone antenna, or the driving range. Therefore, Ms. Hodges does not have any conflicts arising from the personal effects rule.

---

<sup>6</sup> We again stress that an effect which may not be reasonably foreseeable at an early stage of a process may become reasonably foreseeable as the process unfolds. Thus, we advise Ms. Hodges that she must be constantly vigilant to ensure that the evolution of the process does not subsequently create conditions in which she *does* have a financial interest.

**E. The “public generally” exception.**

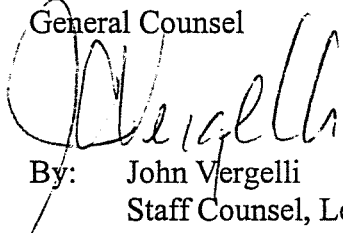
For a *disqualifying* conflict of interest to exist, the reasonably foreseeable financial effect of a governmental decision on the public official’s financial interest must be “distinguishable from its effect on the public generally.” (Section 87103.) The material financial effect on a public official’s financial interest is *indistinguishable* from the effect on the public generally if the decision will affect a “significant segment” of the public “in substantially the same manner” as it affects the public official. (Regulation 18703(a)(1),(2).)

We advise that the public generally exception does not apply to Ms. Hodges’ conflict arising from her employer. It seems virtually impossible that a significant segment of the public will be affected in substantially the same manner as will be her employer as a plumbing supply business. Therefore, Ms. Hodges has a *disqualifying* conflict of interest in decisions about the casino expansion project.

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

Sincerely,

Steven G. Churchwell  
General Counsel



By: John Vergelli  
Staff Counsel, Legal Division

SGC:JV:tls