



FAIR POLITICAL PRACTICES COMMISSION

428 J Street • Suite 620 • Sacramento, CA 95814-2329

(916) 322-5660 • Fax (916) 322-0886

July 7, 2011

Tom O’Gorman
P.O. Box 952
Willow Creek, CA 95573

Re: Your Request for Advice
Our File No. A-11-117

Dear Mr. O’Gorman:

This letter responds to your request for advice regarding the conflict of interest provisions of the Political Reform Act (the “Act”).¹ Please bear in mind that we do not provide advice on law outside the Act, such as common-law conflict of interest, and that the Commission does not act as a finder of fact when providing advice. (*In re Oglesby, supra*, 1 FPPC Ops. 71.)

QUESTIONS

1. Do you have a conflict of interest in Board decisions relating to creation of a septic tank inspection and maintenance district for the downtown area, or a wastewater system?
2. If, due to a conflict of interest, you may not participate in your official capacity as a boardmember during the Board’s decisionmaking processes, does the Act permit you to sit in the audience during a Board meeting and to speak as a member of the public representing your own interests as a landowner?

CONCLUSIONS

1. Your account of the facts indicates that you would have a conflict of interest in the decisions you describe. However, the circumstances you describe also indicate that your participation in these decisions may be permissible under the “public generally” exception to the Act’s conflict-of-interest rules. The availability of this exception is determined by facts and circumstances the Commission cannot decide in giving advice.

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.

We do, however, outline the analysis that you must employ to make this fact-based determination.

2. You may attempt to influence the Board's decision by appearing publicly before the Board *as a private citizen* representing your own personal interests as described further below.

FACTS

You are a boardmember of the Willow Creek Community Services District (hereafter "the District"), a California Special District empowered to provide water, wastewater, recreation, and street lighting facilities and services within its jurisdiction. At present the District does not provide wastewater services, but has listed provision of such services as a high priority. The District has received a grant to create a septic tank inspection and maintenance district for the downtown area, and it has made a motion to pursue creation of a wastewater system, though a funding source has not been identified.

Downtown Willow Creek is a highly concentrated area within the larger city. The area has an occasional problem with sewage smell, and its development is complicated by county rules. The county has allowed a few new projects by waiving a reserve leach field requirement on the expectation that a wastewater system is likely to be built in the near future. If such a system is built, the entire community will benefit indirectly by having a more prosperous downtown business district, and directly by having a local facility for emptying a septic tank pump truck, reducing dramatically the cost of pumping septic tanks throughout the district. The downtown, of course, would benefit more directly.

Willow Creek is a rural community. The District has about 1,000 customers or, as you explained over the telephone on June 22, 2011, about 1,000 water system "hookups." The downtown area has between 50 and 150 properties; you and the District's General Manager estimate that this includes some 53 businesses, with 39 more elsewhere in the city. Some properties in the downtown are vacant, and many are under-developed. Businesses in the city are varied in nature and diverse in size, from a country club and a gravel company to gas stations, restaurants, grocery stores, a hardware store, and agricultural enterprises like small farms and the downtown stand where you sell produce from a tent on commercial property in which you are a part owner. That downtown parcel would likely be included within either a septic tank inspection and maintenance district or a wastewater district, although no boundaries have been established yet.

ANALYSIS

The Act's conflict of interest provisions are designed to 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 when 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 uses an eight-step analytical framework to determine whether a public official has a disqualifying conflict of interest in a particular governmental decision, which we outline as pertinent to your questions. (See Regulation 18700(b)(1)-(8).)

Step One: Are You a “Public Official” Subject to the Act’s Conflict-of-Interest Provisions?

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.) The District is a “local government agency” as that term is defined at Section 82041, and its boardmembers are “public officials” within the meaning of the Act.²

Step Two: Will You Be Making, Participating in Making, or Using Your Official Positions to Influence the Making of 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 on a decision. (Regulation 18702.2.)³ A public official is using his or her official position to “influence a governmental decision” if he or she contacts or appears before, or otherwise attempts to influence any member, officer, employee, or consultant of the City regarding the decisions. (Regulation 18702.3.)

² If a public official’s office is listed in Section 87200 and he or she has a conflict of interest in a decision noticed at a public meeting, he or she must: (1) immediately prior to discussion of the item, identify orally and on the record of the meeting each type of economic interest involved in the decision with details of the economic interest(s) as discussed in Regulation 18702.5(b)(1)(B); (2) recuse himself or herself; and (3) leave the room for the duration of the discussion and/or vote on the item. Community Services Districts are not specifically listed in Section 87200, but such agencies *may* be subject to Section 87200 if they manage public investments. For closed sessions, consent calendars, absences, and speaking as a member of the public regarding personal interests, special rules found in Regulation 18702.4 and 18702.5 apply, as discussed more fully below. (Section 87105.)

³ As will be shown in the concluding discussion, 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.

Thus even without casting a vote a boardmember could violate the Act's conflict-of-interest rules if he or she make recommendations on a decision before the Board, or otherwise attempt to influence any member, officer, employee or consultant of the District relating to a matter in which the boardmember has a financial interest.

Step Three: Identifying an Official's Economic Interests—Possible Causes of Conflicts of Interest.

A public official has a "financial interest" in a governmental decision if it is reasonably foreseeable 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 listed below:

- 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);
- 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 \$420 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).)

Your question is confined to possible effects on your economic interest in the business you operate from a parcel of downtown commercial property, a lot in which you have a partial ownership interest. Because you have not provided information on other economic interests, our analysis is limited to the economic interests you have described.

Step Four: Are Your Economic Interests Directly or Indirectly Involved in the Described Decisions?

1. *Your business*: A business entity is directly involved in a decision before an official's agency when the business entity, either directly or through an agent:

- Initiates the proceeding in which the decision will be made by filing an application, claim, appeal, or similar request or;
- 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.

Your account of the facts indicates that your business has neither initiated the proceeding(s) at issue nor is the subject of a proceeding, within the meaning of this rule. Accordingly, your business is only indirectly involved in the decisions you describe.

2. *Your real property*: Real property in which a public official has an economic interest is considered *directly* involved in a governmental decision under any of the following circumstances:

- The property is located within 500 feet of the boundaries of the property that is the subject of the decision. (Regulation 18704.2(a)(1).)
- The 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 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 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 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 not directly involved in a governmental decision is indirectly involved. (Regulation 18704(a).) Your account of the facts indicates that your real property interest is *directly* involved in the decisions you describe, since you anticipate that your downtown property would probably lie within the area served by one or both new districts, and in any event would lie within 500 feet of that area.

Step Five: Material Financial Effects.

Regulation 18704.1 states that the materiality standards for a business entity not directly involved in a governmental decision are those set forth in Regulation 18705.1. (Copy enclosed.) This regulation establishes a level of materiality roughly scaled to the economic size of the business; if we assume that your business falls under the standard for small businesses, a governmental decision has a material financial effect on the business under Regulation 18705.1(c)(4) when:

- (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.

As to your interest in real property, Regulation 18705.2(a)(1) provides that *any* financial effect of a governmental decision on real property directly involved in a governmental decision is presumed to be material. Under this regulation the presumption may be rebutted by proof that it is not reasonably foreseeable that the governmental decision will have *any* financial effect at all on the real property. You have not suggested that the decision would have *no* financial effect on real property within the target areas, or other grounds sufficient to rebut the presumption. We therefore conclude that the real property on which your business is situated, if affected *at all* by a decision, would be affected “materially.”

Step Six: Reasonable Foreseeability.

Whether a financial effect of a governmental decision is reasonably foreseeable at the time the decision is made depends on the facts of each particular case. The effect of a decision is “reasonably foreseeable” if it is “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.” On the other hand, if an effect is only a mere possibility, it is not reasonably foreseeable. (*Ibid.*)

You have indicated that the purpose of these proposed new districts is to create a more prosperous downtown area, where your real property interest is situated. We must therefore conclude that it is “reasonably foreseeable” that the decisions in question will have *some* economic effect on your downtown real property interest. We next consider whether an exception to the conflict rules will nevertheless permit you to vote on the decisions you have described.

Steps Seven and Eight: Public Generally and Legally Required Participation.

Step Seven: Public Generally

Even if a public official determines that a decision will have reasonably foreseeable material financial effect on his or her economic interest, the official may still participate under the “public generally” exception if the financial effect of the decision on his or her economic interests is indistinguishable from its effect on the public generally. (Section 87103; Regulation 18707.)

An official may participate in a decision under this statutory exception only in cases that meet the requirements specified at Regulation 18707.1 (copy enclosed). This means that the official must, while exercising due diligence, determine that that the decision would affect (1) a “significant segment” of the public in (2) “substantially the same manner” as it affects the official’s own economic interest.

The economic interests that you have described to us are your downtown produce business, situated on a commercial lot in which you have a partial ownership interest. We assume, for purposes of this analysis, that your interest in this business entity and in the commercial lot is each worth \$2,000 or more.

Regulation 18707.1(b)(1)(B) provides a rule for decisions that affect a public official’s real property. This provision requires that the official choose a significant segment consisting of *all property owners* in the jurisdiction, or of *all residential property owners*. We believe that the “significant segment” most appropriate in your case would be *all* property owners in the jurisdiction, including owners of commercial as well as residential properties.

When an official’s economic interest is a business entity, a “significant segment” of the public is defined as either 2,000 business entities or 25 percent of all business entities in the jurisdiction or district the official represents – when the effect is on persons composed of more than a single industry, trade, or profession.⁴ (Regulation 18707.1(b)(1)(C).) Given the small

⁴ Your account of the facts indicates that the businesses in Willow Creek are not enterprises within a single industry, trade, or profession.

size of Willow Creek, it is clear that the “significant segment” most likely to apply in your case is 25 percent of the businesses in the city.⁵

Having established the “significant segment” of the public against which to measure the reasonably foreseeable effects of a decision on both of your economic interests, you must determine whether those effects would be “substantially similar” to the reasonably foreseeable financial effects on 10 percent or more of real property within the city, and 25 percent or more of the city’s businesses.

Subdivision (b)(2), the lengthy final section of Regulation 18707.1, is specifically devoted to explaining how to determine when a governmental decision may be said to effect an official’s economic interests in “substantially the same manner” as it affects other real properties within the appropriate “segment” of the public generally. This subdivision begins by noting that “financial effects are measured in terms of the overall dollar amount of the increase or decrease in the value of the property and not by a percentage increase or decrease affecting property values as a whole.”

The rule then provides thirteen *examples* of ways to compare financial effects on properties within the significant segment, including the relative value of the effect on the official’s property compared to other properties, the size, location or other characteristics of the official’s property as compared to other properties within the significant segment, the fair market value of the official’s property as compared to other properties within the significant segment, and so on.

These examples are provided to illustrate some of the metrics that may be used to reach a sound conclusion on whether or not the official’s property will be affected in “substantially the same manner” as other properties that make up a “significant segment” of properties within the jurisdiction. The process is similar to the approach a real estate appraiser would use to quantify the financial effect of a governmental decision on the official’s property and on “comparable” properties nearby. Precise calculations may not always be possible, but a careful analysis sufficient to identify similarities and disparities in the likely effects on various properties is enough to satisfy the requirements of the Act.

Regulation 18707.1 does not illustrate a similar set of metrics to be considered in determining the effects of a governmental decision on business entities. The overall approach is not different, however. You must undertake the kind of analysis a business appraiser would employ to evaluate the effects of a governmental decision on the income, expenses, assets and value of your business and other businesses within the jurisdiction. As noted in Regulation 18707.1(b)(2), here also “[t]he financial effect need not be identical for the official’s economic interest to be considered ‘financially affected’ in ‘substantially the same manner’.”

⁵ Your account of the facts indicates that far more than 25 percent of the businesses in Willow Creek are located in the downtown area. In fact, the 53 downtown businesses amount to 57 percent of all businesses in the city. If your estimates are correct, 23 downtown businesses are enough to constitute a “significant segment” of the city’s 92 businesses.

If, after careful consideration, you conclude that the effect of a decision on your economic interests will be “substantially similar” to the effects on other businesses and properties constituting a “significant segment” of the public, you may participate in the decision under the “public generally” exception. We cannot make this determination for you, because it requires knowledge of the local business and real estate markets, an informed understanding of the foreseeable effects of the decision, and similar elements of local factual knowledge that we do not possess.

Step Eight: Legally Required Participation

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.)

Because you have not presented any facts indicating that the legally required participation exception is applicable here, we do not analyze this exception.

Finally, you ask whether, if you have a conflict of interest in a decision, you may address the Board in your capacity as a private citizen, seeking to influence the outcome of the vote as a citizen with an interest in decisions before the Board. The answer to this question is “yes.” Regulation 18702.4(b) provides (in pertinent part):

“(b) Notwithstanding Title 2, California Code of Regulations, section 18702.3(a), an official is not attempting to use his or her official position to influence a governmental decision of an agency covered by that subsection if the official:

(1) Appears in the same manner as any other member of the general public before an agency in the course of its prescribed governmental function solely to represent himself or herself on a matter which is related to his or her personal interests. An official's "personal interests" include, but are not limited to:

(A) An interest in real property which is wholly owned by the official or members of his or her immediate family.”

Regulation 18702.5(d)(3) further provides:

“(3) Speaking as a Member of the Public Regarding an Applicable Personal Interest: When a personal interest found in 2 Cal. Code Regs. section 18702.4(b) is present, a public official may speak as a member of the general public if he or she complies with subdivisions (b)(1) and (b)(2) of this regulation, recuses himself or herself from voting on the matter and leaves the dais to speak from the same area as the members of the public.

He or she may listen to the public discussion of the matter with the members of the public.”

We have advised that when this exception applies, you must limit your comments to your personal interests, and should make clear that you are not speaking in the interest of any other person or group and that you are not acting in any official capacity. (*Burns* Advice Letter, No. A-06-178, citing to *McHugh* Advice Letter, No. 1-98-324.) Copies of both regulations are enclosed for your review.

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

Sincerely,

John W. Wallace
Assistant General Counsel



By: Lawrence T. Woodlock
Senior Counsel, Legal Division

LTW:jgl

Enclosure