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Board of Supervisors
County of El Dorado
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Re: Consideration of Conflict of Interest Issues with Respect to Contemplated Board of Supervisors' Action Regarding the Matter of Ronald V. Briggs and Norma Santiago v. County of El Dorado et al., Placer County Superior Court Case Number SCV-0036836; Random Selection of Board Member to Participate in Action; Disclosure of Financial Interest in the Briggs/Santiago v. County of El Dorado Matter

Honorable Chair and Members of the Board:

On August 16, 2016, the Board of Supervisors is scheduled to consider, in closed session Item 16-0867, what action to take and/or direction to give counsel regarding the matter of *Ronald V. Briggs and Norma Santiago v. County of El Dorado et al.*, Placer County Superior Court Case Number SCV-0036836.

County Counsel has been reviewing the law as it relates to conflict of interest with respect to the upcoming closed session. It appears that up to four members of the Board of Supervisors may have a conflict of interest-Chairman Mikulaco, Supervisor Frentzen, Supervisor Ranalli and Supervisor Novasel. If so, they are prohibited from voting on the item. If all four are prohibited from voting, that reduces the number of supervisors available to vote on the item to one, two short of a quorum. Under the rule of legally required participation, a sufficient number of supervisors with conflicts of interest to make a quorum and act on the ordinance would be permitted to vote on the item. Therefore, two supervisors otherwise disqualified from voting, selected randomly, would be able to participate on the item. (2 CA ADC §18705(c)(3)). Because three affirmative votes are necessary for any Board action, the Board members selected would be entitled to vote on the matter, not just be present to make a quorum. Cal. Government Code § 25005¹; County of El Dorado Charter § 207. Any action taken or direction given by the Board would have to be unanimous among the three members voting on it. It is recommended that the four supervisors randomly select among themselves to see which two will be able to participate in the closed session regarding the

Briggs/Santiago lawsuit on August 16, 2016, including any decision on action to be taken or direction given to counsel as regards that lawsuit.

¹ A majority of the members of the board constitute a quorum for the transaction of business. No act of the board shall be valid or binding unless a majority of all the members concur therein. Cal. Gov't Code § 25005 (West)

Background.

On or about September 15, 2015, former Board of Supervisors members, Ronald V. Briggs (hereinafter “Briggs”) and Norma Santiago (hereinafter “Santiago”) filed a Petition for Writ of Mandate seeking additional compensation to which they claim they were entitled while they served as El Dorado County Supervisors. That additional compensation took the form of a 4.6% Management Leave In-Lieu Pay; a 3.5% Cost of Living Increase; and a 5% Cost of Living/Equity Adjustment. (Petition for Writ of Mandate p.12/Lines 23-26.)

The County opposed the Petition for Writ of Mandate. As the litigation proceeded, the Petitioners added claims for additional compensation in the form additional base pay in the amount of \$27,812.67 for Briggs and \$32,353.83 for Santiago. Petitioners also claimed a right to an additional \$19,545.83 in salary increases based on the average 6.6% “average salary increase” given over the years 2011 through 2014 to three elected officials.

On July 28, 2016, the Honorable Charles D. Wachob, Judge of the Placer County Superior Court issued his ruling in the above captioned matter. Judge Wachob denied all of the Petitioners’ claims for additional compensation except for the claim for the 4.6% Management Leave In-Lieu Pay benefit. The value of that benefit is approximately \$3,535 per year for each of the Petitioners. Under the reasoning of the Court, the entitlement to the 4.6% Management In-Lieu Pay benefit would apply to current Board members.

Given the ruling of Judge Wachob, the Board must now decide what steps to take regarding the litigation. The various options are: to appeal the ruling once judgment is entered; a motion for new trial; settlement of the matter, or simply allowing the judgment, once entered, to stand. Because the reasoning of the ruling would apply to sitting Board members thereby resulting in their entitlement to an additional benefit valued at approximately \$3,535 per year, the conflict of interest issue must be addressed. Simply put, a decision by the Board to allow the judgment, once entered, to stand would result in increased compensation to sitting Board members. The only Board member unaffected by the ruling is Supervisor Veerkamp because he has waived his salary and benefits. Therefore the ruling has no effect on his compensation.

Analysis.

Section 87100 of the California Government Code recites the general rule prohibiting a public official from acting on a matter in which he or she has a conflict of interest. It states that:

“No public official at any level of state or local government shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest.”

Section 87103² goes on to explain when a public official has a financial interest in a decision. It states, in part, that:

“A public official has a financial interest in a decision within the meaning of Section 87100 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 of the following:

Any business entity in which the public official has a direct or indirect investment worth two thousand dollars (\$2,000) or more.

² All further reference are to the Government Code unless otherwise specified.

- a. Any real property in which the public official has a direct or indirect interest worth two thousand dollars (\$2,000) or more.
- b. Any source of income, except gifts or loans by a commercial lending institution made in the regular course of business on terms available to the public without regard to official status, aggregating five hundred dollars (\$500) or more in value provided or promised to, [or] received by, the public official within 12 months prior to the time when the decision is made.
- c. Any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management.
- d. Any donor of, or any intermediary or agent for a donor of, a gift or gifts aggregating two hundred fifty dollars (\$250) or more in value provided to, received by, or promised to the public official within 12 months prior to the time when the decision is made. The amount of the value of gifts specified by this subdivision shall be adjusted biennially by the commission to equal the same amount determined by the commission pursuant to subdivision (f) of Section 89503. . . .”

Most of the terms and phrases used in these code sections have been the subject of extensive interpretation and definition by regulations adopted by the Fair Political Practices Commission (“FPPC”). Reliance on advice of counsel is not a defense to prosecution for a violation of the Political Reform Act. The officers involved cannot rely on the advice given by County Counsel to provide immunity from a violation of the Political Reform Act. If any affected officer wishes to seek an official advice letter from the FPPC, you can do that and if it’s concluded that the official does not have a conflict of interest, that official can rely on that letter.

Our present situation involves the question as to whether the four supervisors who receive salary and benefits by virtue of their position on the Board of Supervisors have a disqualifying conflict of interest which would preclude them from making or participating in a decision as to how to proceed in regards to the Briggs/Santiago lawsuit when the judge in that matter has rendered a ruling that members of the Board of Supervisors are entitled to a 4.6% Management Leave In-Lieu Pay. Historically, the Management Leave In-Lieu Pay has not been included in a supervisor’s compensation. Any decision by this Board as to how to proceed in the lawsuit naturally involves a question of the effect of that decision upon their compensation. The recitation of the issue essentially answers the question.

The four Supervisors are covered by the Political Reform Act.

There is no question that each of the four supervisors is a “public official” as defined by Section 87100. (Section 82048; 2 CCR 18700(c)(1)).

Decisions about the Briggs/Santiago lawsuit are covered by the Act’s conflict-of-interest provisions.

The FPPC has also answered the question as to whether the decisions that might be made regarding the manner in which a lawsuit is defended or prosecuted would be the types of decisions covered by the Political Reform Act. In Advice Letter A99-239, the FPPC stated:

“The Act’s conflict-of-interest provisions apply only where a public official “make[s], participate[s] in making, or in any way attempts to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest.” (Section 87100; Regulation 18700(b)(2).) The Commission has adopted a series of regulations which define “making,” “participating in making,” and “influencing” a governmental decision, and which provide certain exceptions. (Regulations 18702-18702.4.)

By deliberating and voting in council decisions about the lawsuit ..., you would be making (Regulation 18702.1), and participating in making (Regulation 18702.2), a governmental decision. Thus, the Act’s conflict-of-interest rules apply to these decisions.”

Therefore, it is fair to conclude that any decisions being made regarding the Briggs/Santiago lawsuit by any of the four board members affected by the ruling in that lawsuit are covered by the Act’s conflict of interest provisions.³

Identifying The Financial Interest.

“(5) “Financial effect” means an effect that provides a benefit of monetary value or provides, prevents, or avoids a detriment of monetary value.

(6) “Financial interest” means anything or anyone listed in subparagraphs (A-E) and includes an interest in the public official's own personal finances and those of a member of his or her immediate family.”

2 CA ADC § 18700

The Act recognizes five types of financial interests. Of the five the most pertinent to our discussion is that found in Section 87103(c):

“Any source of income, ... aggregating five hundred dollars (\$500) or more in value provided or promised to, [or] received by, the public official within 12 months prior to the time when the decision is made.”

This is further clarified in the Regulations.

“A personal financial effect means the financial effect of a governmental decision on the personal finances of a public official or his or her immediate family. The financial effect is material if the official or the official's immediate family member will receive a measurable financial benefit or loss from the decision.”

2 CA ADC § 18702.5

In our case, the decision of the Board regarding how to address the Briggs/Santiago lawsuit could result in compensation valued in excess of \$3,000 per twelve-month period which is well in excess of the \$500 limit established by Section 87103.⁴

³ Advice letters of the FPPC are specific to the recipient and cannot be relied upon for immunity from prosecution by any other person. They can, however, be relied upon as general guidance.

⁴ Although the Act excepts from income “Salary and reimbursement for expenses or per diem...or other similar benefit payments from a state, local, or federal government agency...”, under the circumstances presented, and the direction of the court in *Lexin v. Superior Court* (2010) 47 Cal.4th 1050 that the Political Reform Act should be read to be consistent with Government Code section 1090 et seq., it is my recommendation that given the direct financial effect the four supervisors may experience and that the effect is very limited in its application, e.g. not to the public generally, it is best to avoid any appearance of impropriety by declaring the conflict.

Decisions regarding the Briggs/Santiago lawsuit could have a reasonably foreseeable material financial effect, distinguishable from its effect on the public generally, on the four supervisors.

“In general, if the financial effect can be recognized as a realistic possibility and more than hypothetical or theoretical, it is reasonably foreseeable. If the financial result cannot be expected absent extraordinary circumstances not subject to the public official's control, it is not reasonably foreseeable.”

2 CA ADC, § 18701

The court in *Smith v. Superior Court* (1994) 31 Cal.App.4th 205,212 described a reasonably foreseeable material financial effect as follows:

“An effect is considered reasonably foreseeable if there is a substantial likelihood that it will occur. Certainty is not required. However, if an effect is only a mere possibility, it is not reasonably foreseeable.”

In our situation, there is little doubt that if the Board decides to let the decision of Judge Wachob stand, there will be a direct financial effect on the compensation of the four supervisors. The decision of the Board will not have a direct financial effect upon members of the public generally.

In conclusion, it appears that Chairman Mikulaco, Supervisor Frentzen, Supervisor Ranalli and Supervisor Novasel would have a conflict of interest in participating in or making decision affecting the Briggs/Santiago lawsuit since the court in that case has ruled that these Board members are entitled to 4.6% Management Leave In-Lieu Pay. This would require that those Board members recuse themselves from making any decision in regards to the Briggs/Santiago lawsuit. This would leave the Board of Supervisors with less than a quorum thereby preventing any action. Having come to that conclusion, the next step is to determine how the Board of Supervisors can perform their obligation to manage and direct litigation involving the County. Fortunately, the Legislature anticipated a situation where conflicts of interest may result in a legislative body being left without a quorum.

There is an exception in the Act to the general prohibition against an official's participation in decision making when a financial conflict of interest exists. The exception applies when the individual public official must act so that a decision can be made or an official action taken. Under such circumstances, recognizing that government must continue to function, the official may participate in the decision making process by following certain procedures. Those procedures are set forth in 2 CA ADC 18705:

“(a) A public official who has a financial interest in a decision may establish that he or she is legally required to make or to participate in the making of a governmental decision within the meaning of Section 87101 only if there exists no alternative source of decision consistent with the purposes and terms of the statute authorizing the decision.

(b) Whenever a public official who has a financial interest in a decision is legally required to make or to participate in making such a decision, he or she shall state the existence of the potential conflict as follows:

(1) The public official shall disclose the existence of the conflict and describe with particularity the nature of the economic interest. “Particularity” as used in this regulation shall be satisfied if the official discloses:

- (A) whether the conflict involves an investment, business position, interest in real property, or the receipt of income, loans, or gifts;
 - (B) ...For income, loans or gifts, the official shall disclose the person or entity that is the source.
- (2) The public official or another officer or employee of the agency shall give a summary description of the circumstances under which he or she believes the conflict may arise.

Either the public official or another officer or employee of the agency shall disclose the legal basis for concluding that there is no alternative source of decision.

- (3) The disclosures required by this regulation shall be made in the following manner:

...(B) If the governmental decision is made during a closed session of a public meeting, the disclosures shall be made orally during the open session either before the body goes into closed session or immediately after the closed session. The information contained in the disclosures shall be made part of the official public record either as a part of the minutes of the meeting or as a writing filed with the agency. The writing shall be prepared by the public official and/or any officer or employee and shall be placed in a public file of the agency within 30 days after the meeting; ...”

In our situation, since four supervisors have the same conflict, the recusal of all four supervisors results in the lack of a quorum thereby precluding any action by the Board. This situation meets the definition of “legally required participation” as contemplated by Regulation 18705.

Recommendation.

Based on the foregoing, County Counsel recommends that:

1. The Board receive and file this report;
2. If the Board members affected by this report accept its conclusions, then select two members randomly to participate in the closed session on August 16, 2016, and further actions of the Board in regards to the Briggs/Santiago lawsuit, if necessary. If any member of the Board affected by this report wishes to obtain a letter opinion from the FPPC on this issue, they should so indicate.

We will be pleased to answer any questions the Board might have in this regard.

Respectfully submitted,



Michael J. Ciccozzi
County Counsel