



EL DORADO COUNTY COUNSEL

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FAIR POLITICAL PRACTICES COMMISSION

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June 24, 2011

Louis B. Green
El Dorado County
Office of the County Counsel
330 Fair Lane
Placerville, California 95667

Re: Your Request for Advice
Our File No. A-11-077

Dear Mr. Green:

This letter is in response to your request for advice, on behalf of Supervisors Ron Briggs, Jack Sweeney and Ray Nutting of the El Dorado County Board of Supervisors 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.

QUESTIONS

1. May County Supervisors Briggs, Sweeney and Nutting vote to permit the City of Placerville to include certain unincorporated territory of the county (the "County Property") in the city's redevelopment project if:

(A) Supervisor Briggs owns (i) five parcels of property located within the redevelopment Area that are within 500 feet of the County Property, (ii) two parcels within the redevelopment area that are 3,300 feet from the County Property, and (iii) one parcel outside the redevelopment area that is adjacent to the redevelopment area?

(B) Supervisor Sweeney owns (i) one parcel of property located within the redevelopment area that is more than 500 feet from the County Property and (ii) another parcel

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.

outside the redevelopment area that is within 500 feet of the redevelopment area and the County Property?

(C) Supervisor Nutting (i) owns property that is more than 500 feet from the redevelopment area and the County Property, (ii) is the trustee of a trust ("Trust A") that owns property within the redevelopment area that is more than 500 feet from the County Property and (iii) is the trustee of another trust ("Trust B") that owns property more than 500 feet from the redevelopment area and the County Property?

2. If a quorum cannot be reached unless one disqualified supervisor votes, what is the method of selecting which supervisor may vote?

CONCLUSIONS

1(A) and (B). No. Supervisors Briggs and Sweeney have a disqualifying conflict-of-interest because it is reasonably foreseeable that the decision will have a material financial effect on each of their real property and business entity economic interests.

1(C). Yes. Supervisor Nutting does not have a disqualifying conflict of interest because the governmental decision will not have a reasonably foreseeable material financial effect on any of his economic interests.

2. Because Supervisor Nutting may vote on the redevelopment plan decision, there is no need to invoke the "legally required participation" exception.

FACTS

The City of Placerville, located in El Dorado County, is proposing to adopt a redevelopment plan. The city has requested, pursuant to California Health and Safety Code Section 33213, the county Board of Supervisors to authorize the inclusion of the County Property in the redevelopment plan. The County Property consists of one area located to the east of the redevelopment plan (the Smith Flat and Motor City areas) and another, smaller area located to the west of the redevelopment area. Because the county property cannot be included in the redevelopment area without the Board of Supervisors' permission, the Board of Supervisors essentially has veto power over inclusion of the County Property in the redevelopment area.

In our telephone conversation of June 22, 2011, you said that the Placerville city council has already voted to approve the redevelopment plan with boundaries that would include the County Property. It is your understanding that if the Board of Supervisors does not approve the inclusion of the County Property in the redevelopment plan, the city council would need to revisit their prior decision. This would probably entail amending the section of the city ordinance governing the redevelopment plan. The city council has stated that the redevelopment plan will proceed, with or without inclusion of the County Property. You also stated that it would be speculative to say what, if any, effect the inclusion of the County Property in the

redevelopment plan would have on the redevelopment plan or on city property located in the redevelopment area.

Supervisor Briggs owns seven parcels of property, five of which are commercial, located *in* the city's redevelopment area. At least one parcel is leased to a tenant. One parcel is adjacent to the County Property. Four parcels are located between 50 and 225 feet from the boundary of the County Property. Two parcels are located .625 miles (approximately 3,300 feet) from the County Property. Part of the commercial property is developed and Supervisor Briggs receives income from leasing this property. Supervisor Briggs also owns one parcel *outside* the redevelopment area that is adjacent to the redevelopment and the County Property.

Supervisor Sweeney owns one parcel of commercial property *in* the redevelopment area that is approximately 4,000 feet from the County Property. At least part of the commercial property is developed and Supervisor Briggs receives income from leasing this property. He also owns a parcel *outside* the redevelopment area that is approximately 165 feet from the redevelopment area and about 7,929 feet from the County Property.

Supervisor Nutting owns 240 acres of real property that is remote from the redevelopment area. Supervisor Nutting is also the trustee of two trusts in which his brother is the sole beneficiary. Supervisor Nutting receives no compensation for serving as trustee of either trust. One trust ("Trust A") holds property *in* the redevelopment area that is located approximately 7,260 feet from the County Property. The other trust ("Trust B") does not hold property near the redevelopment area or the County Property. Trust B holds 360 acres of land that, together with the 240 acres owned personally by Supervisor Nutting, are operated as a family ranch. Supervisor Nutting is compensated by Trust B for his efforts in participating in harvesting timber on the ranch. Even though the ranch has two owners (Supervisor Nutting and Trust B), it is operated as a single unit under one timber harvesting plan. Thus, timber may be harvested on Supervisor Nutting's part of the ranch or on the part held by Trust B. In addition, Supervisor Nutting and Trust B share in profits from timber harvesting, regardless of whose land the trees are harvested from.

Trust A permits the beneficiary, Supervisor Nutting's brother, to take income from the trust and contribute it toward expenses of operating the family ranch. This is the only relationship between Trust A and Trust B. As noted above, Supervisor Nutting shares in timber harvesting profits even when the land from which the trees are harvested is owned by Trust B.

You state that funding for redevelopment is received from a portion of property taxes that result from the increase in assessed values of property in the redevelopment area, called "tax increment financing." Because the redevelopment agency operates as an integrated whole, the tax increment is not apportioned according to its geographic source. Tax increment generated in the County Property could be used to finance redevelopment activity in the city, and vice-versa.

The Placerville city council's approval of the redevelopment plan does not include approval of any specific project. It simply establishes the redevelopment plan and authorizes the

redevelopment agency to undertake redevelopment activity in the area. It sets out the powers of the redevelopment agency. Any particular project must be subsequently approved by the redevelopment agency, but not the County. You state that, at this time, it is extremely difficult to ascribe any particular impact, if any, of the redevelopment plan to particular properties in which the supervisors have an economic interest.

You ask whether the supervisors have a conflict of interest that would disqualify them from voting to authorize the inclusion of the County Property in the city's redevelopment plan. You also ask what method of selection should be used to select the supervisor who may participate, if all three supervisors are disqualified and one disqualified supervisors must vote to establish a quorum.

ANALYSIS

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).) 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.

The Commission has adopted an eight-step standard analysis for deciding whether an official has a disqualifying conflict of interest. (Regulation 18700(b).) The general rule, however, is that a conflict of interest exists whenever a public official makes a governmental decision that has a reasonably foreseeable material financial effect on one or more of his or her financial interests.

Steps 1 and 2. Are the supervisors "public officials" within the meaning of Section 87100? Will they be making, participating in making or influencing a governmental decision?

As members of the County Board of Supervisors, the supervisors are public officials under Section 87200. When voting to authorize inclusion of the County Property in the city's redevelopment plan, they will be making a governmental decision.

Step 3. What are the supervisors' economic interests?

The Act's conflict-of-interest provisions apply only to conflicts of interest arising from certain enumerated economic interests. These economic interests are described in Section 87103 and Regulations 18703-18703.5, inclusive:

- 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. (Section 87103(a); Regulation 18703.1(a).)
- A public official has an economic interest in a business entity 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).)

- 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.)

- An official has an economic interest in any source of income, including promised income, totaling \$500 or more within 12 months prior to the decision. (Section 87103(c); Regulation 18703.3.)

- A public official has an economic interest in any source of gifts to him or her if the gifts total \$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 commonly referred to as the “personal financial effects” rule. (Section 87103; Regulation 18703.5.)

Supervisor Briggs

Real Property

Supervisor Briggs owns seven parcels located in the redevelopment area and another property outside the redevelopment area. Thus, he has an economic interest in both properties.²

Business Entity

Five of the seven parcels located in the redevelopment area are commercial properties. At least a part of these parcels are operated for profit by leasing the property to tenants. Section 82005 defines “business entity” as any organization or enterprise operated for profit, including a sole proprietorships, partnership and corporation. Thus, whatever the form of organization, Supervisor Briggs has an economic interest in a business entity.

Source of Income

Supervisor Briggs receives income from his business entity that operates the commercial property. Thus, he has a source-of-income economic interest in the business.

Personal Finances

A public official is considered to always have an economic interest in his or her personal finances. (Regulation 18703.5.) However, 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

² For purposes of our analysis, we assume that the value of each supervisor’s interest in real property is at least \$2,000.

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).) The personal financial effects rule does not appear to apply to the circumstances of Supervisors Briggs, Sweeney or Nutting and we will not discuss it further.

Supervisor Sweeney

Real Property

Supervisor Sweeney owns real property both in the redevelopment area and outside the redevelopment area. Thus, he has an economic interest in both properties.

Business Entity

Supervisor Sweeney owns commercial property in the redevelopment area, part which is developed and income producing. As in the case of Supervisor Briggs, he has an economic interest in a business entity.

Source of Income

Supervisor Sweeney receives income from his business entity that operates the commercial property. Thus, he has a source-of-income economic interest in the business.

Supervisor Nutting

Real Property.

Personally owned real property.

Supervisor Nutting owns 240 acres of real property that you say is remote from the redevelopment area. Under Section 87103(b) and Regulation 18703.2 he has an economic interest in the real property.

Real Property owned by the Trusts.

Supervisor Nutting is the trustee of Trust A and Trust B. Under Regulation 18234(a), an official has an economic interest in the pro rata share of the interests in real property, sources of income and investments of a trust in which the official has a direct, indirect, or beneficial interest of 10 percent or greater. However, under subdivision (d), an official does not have a direct, indirect, or beneficial interest in a trust *solely* because the official is a trustee or co-trustee, unless the official receives income for the performance of trustee services. Because Supervisor Nutting is the trustee of the trusts and not a trustor or beneficiary and he receives no payment for his services as trustee, he does not have an interest in the real property owned by Trust A or Trust B.

Business Entity

You indicate that the family ranch is operated for profit and that Supervisor Nutting is the sole owner of the part of the ranch not owned by Trust B. Under these circumstances, Supervisor Nutting has an economic interest in a business entity that he operates as a sole

proprietorship.³ Under Section 87103(a) and Regulation 18703.1(a), Supervisor Nutting has a business entity economic interest in his business.

In addition, Supervisor Nutting may have an economic interest in Trust A. Section 87103(d) provides that a public official has a potentially disqualifying conflict of interest in a business entity in which the official is “a director, officer, partner, *trustee*, employee, or holds a position of management” in the business entity. (Emphasis added). Regulation 18703.1 states, in part, that: “For purposes of disqualification under Government Code sections 87100 and 87103, a public official has an economic interest in a business entity if any of the following are true: . . . (b) the public official is a director, officer, partner, *trustee*, employee, or holds any position of management in the business entity.” (Emphasis added.)

However, Regulation 18234(c), which specifically applies to trusts, provides that for purposes of determining whether a public official has an economic interest in real property, sources of income or investments of a trust, the official has an economic interest only if the official is a trustor or beneficiary of the trust. Subdivision (d) further provides that a public official does not have a direct or indirect interest in a trust solely because the official is a trustee or co-trustee unless the official receives payment for the official’s services as a trustee. Supervisor Nutting is not compensated for serving as trustee of Trust A or Trust B.

Although it may appear that Regulation 18703.1 and 18234 are inconsistent, we can resolve any inconsistency by applying an axiom of statutory construction: a particular or specific provision will take precedence over a conflicting general provision. (Sec. 1859, C.C.P.; *Agricultural Labor Relations Board v. Superior Court* (1976) 16 Cal.3d 392, 420.) Regulation 18234 applies specifically to trusts and trustees, whereas Regulation 18703.1 addresses a broad category of positions an official may hold with a business entity, such as director, officer, partner, manager or employee. Applying this rule of construction, Supervisor Nutting does not have an economic interest in Trust A or Trust B under Regulation 18234.

Sources of Income.

You indicate that Supervisor Nutting receives compensation from Trust B for his efforts in participating in timber harvesting on the ranch. Accordingly, Trust B is a source of income to Supervisor Nutting if he receives \$500 or more within 12 months prior to a governmental decision. In addition, profits from timber harvesting are shared between Supervisor Nutting’s business and Trust B, regardless of who owns the land from which the timber was harvested. When Supervisor Nutting’s business receives profits attributable to land owned by Trust B, Trust B is a source of income.

³ For purposes of our analysis, we assume that each supervisor’s investment in their businesses is worth \$2,000 or more.

Step 4. Will the supervisors' economic interests be directly or indirectly involved in decisions they will make, participate in making or influence as public officials?

Real Property

Under Section 18704.2(a), real property is directly involved in a governmental decision if:

“(1) The real property in which the official has an interest, or any part of that real property, is located within 500 feet of the boundaries (or the proposed boundaries) of the property which is the subject of the governmental decision. For purposes of subdivision (a)(5), real property is located within 500 feet of the boundaries (or proposed boundaries) of the real property which is the subject of the governmental decision if any part of the real property is within 500 feet of the boundaries (or proposed boundaries) of the redevelopment project area.

“(2) The governmental decision involves the zoning or rezoning, annexation or deannexation, 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. For purposes of this subdivision, the terms ‘zoning’ and ‘rezoning’ shall refer to the act of establishing or changing the zoning or land use designation on the real property in which the official has an interest.

“(3) The governmental decision involves the issuance, denial or revocation of a license, permit or other land use entitlement authorizing a specific use or uses of the real property in which the official has an interest.

“(4) The governmental 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.

“(5) The governmental 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.

“(6) 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.”

Business Entity and Source of Income

Under Regulation 18704.1(a), a person, including a business entity and source of income, is directly involved in a decision before an official’s agency when that person, 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 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.”

Supervisor Briggs

Real Property

Supervisor Briggs owns real property in the redevelopment area and property outside the redevelopment area located within 500 feet of the redevelopment area. Under Regulation 18704.2(a)(1), his real property is directly involved.

Business Entity and Source of Income

Supervisor Briggs’ business owns commercial real estate in the redevelopment area. The business will not be initiating the proceeding nor is the business a named party in, or the subject of the proceeding. Accordingly, the business entity is not directly involved. If a public official’s economic interest is not directly involved in a governmental decision, it is indirectly involved. (Regulation 18704(a).)

Supervisor Sweeney

Real Property

Supervisor Sweeney owns real property both in the redevelopment area and outside the redevelopment area. The property outside the redevelopment area is within 500 feet of the redevelopment area. Under Regulation 18704.2(a)(1), both properties are directly involved.

Business Entity and Source of Income

Supervisor Sweeney's business will not be initiating the proceeding nor is the business a named party in, or the subject of the proceeding. Accordingly, the business entity is indirectly involved.

Supervisor Nutting

Real Property

Supervisor Nutting owns 240 acres of real property outside the redevelopment area which you describe as remote from the redevelopment area. Because Supervisor Nutting's real property is located more than 500 feet from the redevelopment area and does not fall within any of the other categories set forth in Regulation 18704.2(a), his property is indirectly involved.

Business Entity and Source of Income

Neither Supervisor Nutting's business, nor Trust B, (a source of income), will be initiating the proceeding regarding the redevelopment area nor is the business a named party in, or the subject of the proceeding. Accordingly, under Regulation 18704.1(a), the business entity and Trust B are indirectly involved.

Step 5. What is the applicable materiality standard?

A conflict of interest may arise only when the reasonably foreseeable financial effect of a governmental decision on a public official's economic interest is material. (Regulation 18700(a).)

Real Property

Under Regulation 18705.2(a), the financial effect of a governmental decision on real property that is *directly* involved in the governmental decision is presumed to be material. 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.

The financial effect of a governmental decision on real property that is *indirectly* involved in the governmental decision is presumed not to be material. This presumption may be rebutted by proof that there are specific circumstances regarding the governmental decision, its financial effect, and the nature of the real property which make it reasonably foreseeable that the decision will have a material financial effect on the real property in which the public official has an interest. Examples of such specific circumstances include the development potential or income producing potential of the real property, the use of the real property and the character of the neighborhood, including substantial effects on traffic, view, privacy, intensity of use, noise levels and air emissions. (Regulation 18705.2(b)(1).)

Business Entities and Sources of Income

The applicable materiality standard for governmental decisions involving business entities is found in Regulation 18705.1. Subdivision (c) sets forth materiality standards for economic interests in business entities that are indirectly involved in a governmental decision, including those that are sources of income. (See Regulation 18705.3(b)(1). For relatively small businesses, the financial effect of a governmental decision on the business entity is material if it is reasonably foreseeable that the governmental decision will increase/decrease the business entity's annual gross revenues by \$20,000 or more, result in the business entity incurring/avoiding additional expenses or reducing/eliminating existing expenses by \$5,000 or more in a fiscal year or increase/decrease the value of the business entity's assets/liabilities by \$20,000 or more. (Regulation 18705.1(c)(4).)

For sources of income that are business entities, the applicable materiality standard is the same as the materiality standard for business entities. (Regulation 18705.3(b)(1).)

Step 6. Is it reasonably foreseeable that the financial effect of the Supervisors' decisions on their economic interests will meet the applicable materiality standard?

An effect is considered "reasonably foreseeable" if the effect is "substantially likely." (Regulation 18706; *In re Thorner* (1975) 1 FPPC Ops. 198.) 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.

Supervisor Briggs

Real Property

A governmental decision regarding real property that is directly involved in the governmental decision is presumed to be material. Under the facts set forth in your letter, the presumption is not rebutted. (Regulation 18705.2(a)(1).) Therefore, the governmental decision regarding his real property is material and Supervisor Briggs may not make, participate in making or attempt to use his official position to influence the Board's decision regarding the redevelopment plan.

Business Entity and Sources of Income

Because Supervisor Briggs is disqualified from participating in the redevelopment decision because of its effect on his interest in real property, we need not address the decision's effect on his business.

Supervisor SweeneyReal Property

A governmental decision regarding real property that is directly involved in the governmental decision is presumed to be material. Under the facts set forth in your letter, the presumption is not rebutted. Therefore, the governmental decision regarding his real property is material.

Business Entity and Source of Income.

Because Supervisor Briggs is disqualified from participating in the redevelopment decision because of his interest in real property, we need not address the decision's effect on his business.

Supervisor NuttingReal Property

Supervisor Nutting's ranch acreage is indirectly involved in the governmental decision and is, therefore, presumed not be material. Regulation 18705.2(b)(1) provides that the presumption of non-materiality may be rebutted by proof that there are specific circumstances regarding the governmental decision, its financial effect, and the nature of the real property that make it reasonably foreseeable that the decision will have a material financial effect on the real property. Under the facts sets forth in your letter, the presumption is not rebutted. Under these facts, Supervisor Nutting does not have a disqualifying conflict of interest because the governmental decision will not have a reasonably foreseeable material financial effect on his property interest.

Business Entity and Source of Income

Regulation 18705.1(c) sets forth the applicable materiality standard for a business entity, including a business entity that is a source of income, based on the size of the business entity. Supervisor Nutting's ranch business, and the adjacent property owned and operated as part of the ranch by Trust B, are located far from the redevelopment area. We need not determine which standard applies to Supervisor Nutting's interest in his business and Trust B because it is very unlikely that a decision regarding the redevelopment area will have *any* effect on Supervisor Nutting's business or Trust B. Accordingly, Supervisor Nutting may vote on the inclusion of the County Property in the redevelopment area without violating the conflict-of-interest provisions of the Act.

Steps 7 & 8 - The "public generally" and "legally required participation" exceptions.

Even if a material financial effect on a public official's economic interest is reasonably foreseeable, he or she still may not be disqualified if the financial effect of the governmental

decision on the public official's economic interest is indistinguishable from its effect on the public generally (Section 87103, Regulations 18700(b)(7) and 18707(a)), or if the official is legally required to participate (Section 87103; Regulation 18708). Because we have determined that Supervisor Nutting may vote to include the County Property in the redevelopment plan, there is no need to invoke the "legally required participation exception. Given that the economic interest of the supervisors are so diverse, it is unlikely that the governmental decision will affect their economic interests in substantially the same manner as it will affect the public generally.

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

Sincerely,

John W. Wallace
Assistant General Counsel

A handwritten signature in black ink, appearing to read "Valentina Joyce", written in a cursive style.

By: Valentina Joyce
Counsel, Legal Division

VJ:jgl