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April 8, 2011

RECEIVED
BOARD OF SUPERVISORS
EL DORADO COUNTY
2011 APR -8 PM 2:10

Board of Supervisors
County of El Dorado
330 Fair Lane
Placerville, CA 95667

Re: Consideration of Conflict of Interest Issues with Respect to Contemplated Board of Supervisors Action to Approve the City of Placerville Redevelopment Plan As It Relates to Unincorporated County Territory; Random Selection of Board Member to Participate in Action; Disclosure of Interests in Real Property Within the Redevelopment Plan Area

Honorable Supervisors:

Summary:

On April 26, 2011, the Board of Supervisors is scheduled to consider an ordinance approving the City of Placerville's redevelopment plan as it relates to certain unincorporated territory included in the plan. This approval is required by California Health and Safety Code Section 33213 in order for the City to proceed with its plans to include the unincorporated County lands in the redevelopment plan.

County Counsel has been reviewing the law as it relates to conflict of interest with respect to the upcoming action. It appears that up to three members of the Board of Supervisors may have a conflicts of interest—Supervisor Sweeney, Supervisor Briggs and Chair Nutting. If so, they are prohibited from voting on the item. If all three are prohibited from voting, that reduces the number of supervisors available to vote on the item to two, one 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, one Supervisor otherwise disqualified from voting, selected randomly (Title 2 Cal. Code of Regs.

§18708(c)(3)(hereinafter referred to as Regulations)), would be able to participate on the item. Because three affirmative votes are necessary for any Board action, that Board member would be entitled to vote on the matter, not just be present to make a quorum. Cal. Government Code § 25005; County of El Dorado Charter § 207. The vote on the ordinance would have to be unanimous among the three members voting on it. It is recommended that the three supervisors randomly select among themselves to see which one will be able to participate in voting on the ordinance in advance of the meeting of April 26, 2011.

Analysis:

Section 87100 of the California Government Code[1] 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 87103 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:
>
> (a) Any business entity in which the public official has a direct or indirect investment worth two thousand dollars ($2,000) or more.
>
> (b) Any real property in which the public official has a direct or indirect interest worth two thousand dollars ($2,000) or more.
>
> (c) 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.
>
> (d) Any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management.
>
> (e) 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

[1] All references are to the California Government Code unless otherwise stated.

> 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"). However, there are some unique aspects to the current situation such that the regulations are not clear in their application. Therefore, we have to do our best at extrapolating from the regulations to the current situation. 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. A formal advice letter from the FPPC can usually be obtained within 21 days of the request. With those caveats in mind, we turn to our analysis.

Supervisors Sweeney and Briggs

Supervisor Sweeney and Supervisor Briggs each own property within the proposed redevelopment area. Supervisor Sweeney reports owning property at 621 Placerville Drive, Placerville, California. Supervisor Briggs reports owning properties at 161, 169, 175 and 181 Placerville Drive, 7490 Green Valley Road, and 3100 and 3076 Gold Nugget Way, all in Placerville, California. All of the properties are located within the City of Placerville.[2] They are not located in the unincorporated territory which is proposed to be added to the redevelopment area. Nor are they within 500 feet of the boundaries of that unincorporated territory. In determining whether Supervisors Sweeney and Briggs have a conflict of interest, the first step is to determine whether their properties would be "directly" or "indirectly" involved in the decision.

FPPC Regulation § 18704.2 gives guidance as to whether an interest in real property is affected directly or indirectly affected by an action taken by an official. Section (a)(5) of that section states, in part, that:

> "(a) Real property in which a public official has an economic interest is directly involved in a governmental decision if any of the following apply:
> . . .

[2] The Clerk of the Board is hereby requested to enter this disclosure of interests in the minutes of the Board of Supervisors.

> (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 the 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." (Emphasis added.)

The significance of the officials' interest in real property being directly involved in the decision is that the financial effect of 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. FPPC Regulation §18705.2. That is an extremely difficult standard to meet if the presumption is to be rebutted. Therefore, in all likelihood, unless an exemption applies, if the real property is deemed directly involved in the decision, there is a conflict of interest and the public official is required to recuse himself from the decision.

This involves a question of interpretation which is not addressed by the regulations. All of the actions listed in Regulation § 18704.2 are, technically, actions taken by the City Council or Redevelopment Agency, not by the County. For example, the City will be responsible for adoption of the redevelopment plan. The County is merely required by Health & Safety Code Section 33213 to approve the redevelopment plan for the unincorporated territory by ordinance. Does the "approval" of the redevelopment plan equate with "adoption" of the redevelopment plan as that term is used in Regulation § 18704.2? It could be argued that "approval" of the redevelopment plan specifically for the unincorporated area does not fall within the meaning of "adoption" of the redevelopment plan. In the opinion of County Counsel, the safer interpretation is that it does. The action of the Board of Supervisors in approving the redevelopment plan is more than an advisory action. Without such Board approval, the City cannot add that unincorporated territory to the redevelopment plan. In effect, the approval of the Board of Supervisors is a necessary prerequisite to the adoption of the redevelopment plan proposed by the City (although it presumably could come after City adoption of the redevelopment plan). We believe that it would be a very fine distinction to say that County approval of the redevelopment plan does not come within the scope of Regulation § 18704.2.

This conclusion tends to be supported by an advice letter issued by the FPPC staff in the year 2000.[3] In Advice Letter No. 00-118, the FPPC advised that a planning commissioner acting on a report and recommendation on an amendment to a redevelopment plan fell within the scope of Regulation § 18704.2 with respect to property he owned which was within the amended project area. This was so even though

[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.

the planning commission was not actually amending the redevelopment plan, it was merely advisory on the matter. The County, acting to approve the redevelopment plan as submitted to it by the City, is in the position of having veto power over extending the redevelopment plan to the unincorporated territory of the County.

There is a second, more difficult, issue associated with the application of Regulation § 18704.2. It says that an interest in real property is directly involved in a governmental decision if the decision is one of those redevelopment decisions and the property is located within the boundaries of the redevelopment area. Health & Safety Code Section 33213 says that the County must approve the redevelopment plan for such area, presumably the unincorporated area. None of the properties owned by Supervisor Sweeney or Supervisor Briggs is within that unincorporated territory or within 500 feet of it. So, is it within the boundaries of the redevelopment area, or is the redevelopment area more restrictively defined to mean only the unincorporated area over which the County has approval authority? We believe that the broader definition of redevelopment area would prevail and the Supervisors' property would be deemed to be within the boundaries of the redevelopment area.

Neither the redevelopment plan nor the redevelopment area are divided into segments. They are developed as an integrated whole and treated that way in the EIR. Presumably, if the County withheld approval of the redevelopment plan as it applies to the unincorporated territory the City would have to go back and do further environmental review. Regulation § 18704.2 just refers to the boundaries of the redevelopment area, it does not distinguish between different parts of the redevelopment area. In fact, Regulation § 18704.2 applies to the addition of territory to the redevelopment area, whether the property owned by the public official is located in the area to be added or is in close proximity to it or not. As long as the property is anywhere in the redevelopment area, it is deemed directly involved in the decision to add land to the redevelopment area. Again, an advice letter issued by the FPPC in 1999 is instructive on the subject. Advice Letter A-99-245 considered the case of a redevelopment area that was formally segmented into zones. A council member owned a home in one zone of the redevelopment area. An amendment to another zone was proposed. She asked the FPPC for an opinion as to whether her property was considered "directly" or "indirectly" involved in the decision to amend the redevelopment plan. The FPPC concluded that it was directly affected, stating:

> "The Commission's regulations provide that real property is *directly involved* in a governmental decision when, among other things, '[t]he 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)(4), emphasis added.)
>
> The 'twist' to the present situation is that the City's redevelopment plan has one project area, with five formally designated 'sub-areas.' Councilmember Julien's personal residence is in one of the sub-area, while the decision is about a separate, geographically distinct sub-area. However, we are bound by the plain language of the regulations adopted by the Commission. Councilmember Julien's personal residence is within the redevelopment project area, and the decision is about amendment to the applicable redevelopment plan. Therefore, we must conclude that her personal residence is directly involved in the decision. (*Ibid.*)" (Emphasis added.)

Since the property owned by Supervisors Sweeney and Briggs is located in the redevelopment area, even though not located within the unincorporated area included in the redevelopment area, we are of the opinion that Regulation § 18704.2 applies and their properties are deemed directly involved in the decision to approve the redevelopment plan. Therefore, unless they can say that the decision will have no financial effect on their property, they have a conflict of interest and may not participate in the decision.[4]

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[4] We understand that several members of the Placerville City Council are participating in redevelopment decisions even though they own property in the redevelopment area. They are doing so under the "public generally" exception. California Government Code Section 87103. That exception states that even if it is reasonably foreseeable that a governmental decision may have a material effect on the economic interests of a public official, that public official does not have a disqualifying conflict of interest in the decision if the official can establish that the governmental decision will affect the public official's economic interests in a manner which is indistinguishable from the manner in which the decision will affect the public generally. In applying the exception, you first determine whether the official's economic interests will be affected the same as a significant segment of the public. In this case, that is whether all property owners affected similarly (the property owners in the redevelopment area) constitute a significant segment of the public. For decisions affecting real property, a significant segment of the pubic is affected if the number of properties similarly affected (the number of property owners in the redevelopment area) is either (a) ten percent (10%) or more of all property owners in the official's agency, or the district he or she represents, or (b) 5,000 property owners. There are only 523 property owners in the entire redevelopment area and 372 are located within the incorporated area of the redevelopment area, so the 5,000 property owners standard doesn't apply. But, it has been determined by the City that the 372 property owners in the City portion of the redevelopment area do constitute ten percent (10%) or more of the 3,476 total property owners in the City. Therefore, they do satisfy the significant segment of the public standard. For a member of the Board of Supervisors to fall under the public generally exception, the 523 property owners in the redevelopment area would have to constitute 10% or more of all property owners in their respective supervisorial districts (assuming that and not the county as a whole would be used as the basis for the calculation), a much larger base. Although we have not calculated the number of property owners in the supervisorial districts, it appears that we could not meet the 10% standard. The City has determined that the number of parcels in the city is 4,413, with there being 3,476 property owners. The number of parcels in District 3, the smaller of the two districts, is 14,994. It is apparent that the number of property owners in that supervisorial district is substantially higher than the number of property owners in the city and that the 523 property owners in the redevelopment area would not constitute 10% of the number of property owners in the supervisorial districts. That is the reason for the distinction between the City Council members and the Board of Supervisors members.

Supervisor Nutting

Supervisor Nutting's position is different than that of Supervisor Sweeney and Supervisor Briggs. Supervisor Nutting does not own any property in the redevelopment area or within 500 feet of it. He reports, however, that he is the trustee on his brother's trust which does own property in the redevelopment area. The property is located at 50 Main Street, Placerville, California.[5] Regulation § 18234 deals with interests in trusts. It states that 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."

Regulation § 18234 goes on to define when a public official has an interest in a trust. Essentially, it says that an official has an interest in a trust if he or she is a trustor or beneficiary of the trust, under certain circumstances. Specifically, subsection (d) of the regulation states as follows:

> "(d) For the purposes of this section, an official does not have a direct, indirect, or beneficial interest in a trust solely because the official is a trustee or co-trustee. However, income received for the performance of trustee services is income as defined in Government Code Section 82030."

Supervisor Nutting receives no compensation for his services as trustee.[6] This would appear to conclude the analysis, but it does not. Supervisor Nutting advises us that his brother's trust, for which he is trustee, is a "business trust." A business trust is similar to an ordinary trust except that it is set up to conduct commercial activity, not simply to protect or conserve the property for beneficiaries. They are taxed similar to corporations. This is important to the analysis because for purposes of the Political Reform Act, the term "business entity" is defined to include business trusts. California Government Code § 82005.

Having determined that the trust is a business entity, we have to ascertain whether Supervisor Nutting has financial interest in the business entity. In defining an economic interest in a business entity, Regulation § 18703.1 states, in part, that:

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[5] The Clerk of the Board is hereby requested to enter this disclosure of interests in the minutes of the Board of Supervisors.

[6] Supervisor Nutting has made us aware that he stands to earn income from the harvesting of timber at his family ranch. The ranch is owned 40% by Supervisor Nutting and 60% by his brother, in trust. However, this is a separate trust from the one that owns the property within the redevelopment area. This factor could be relevant to the question of whether Supervisor Nutting has a conflict of interest in the matter before the Board. The analysis is extremely complicated. Because we conclude that Supervisor Nutting likely has a conflict of interest on other grounds, we do not consider this as a factor in our analysis.

> "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.)(See also, California Government Code Section 87103(d).)

Presumably, the reference to "trustee" refers to a trustee of a business trust. Therefore, Supervisor Nutting appears to have an economic interest in a business entity that is involved in a governmental decision, despite the fact that he is not deemed to have a beneficial interest in the trust and its underlying assets pursuant to Regulation § 18234. The question, therefore, is, again, whether the business entity is "directly" or "indirectly" involved in the decision. To determine this, we turn to Regulations § 18704.1. That section provides, in part, that:

> "(a) A person, including business entities, sources of income, and sources of gifts, 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 decisions 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.
> . . ."

Since the trust did not initiate the redevelopment proceedings, and it is not a named party in the proceedings, it is not directly involved in the governmental decision. Therefore, we have to analyze whether the foreseeable impacts on the trust are "material" as applied to an "indirectly" affected party. For this, we turn to Regulation § 18705.1. That section reads, in part, as follows:

> " . . .
> (c) Indirectly involved business entities. The following materiality standards apply when a business entity in which a public official has an economic interest is indirectly involved in a governmental decision. If more that one of the following subdivisions is applicable to the business entity in question, apply the subdivision with the highest dollar thresholds.
> . . .

> (4) If the business entity is not covered by subdivisions (c)(1)-(3), the financial effect of a governmental decision on the business entity is material if it is reasonable foreseeable that:
>
> (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 or $20,000 or more.
> . . ."

In all likelihood we are not talking about subsections A and B. The question is whether the redevelopment activity contemplated is likely to increase or decrease the value of the assets of the trust (the property owned within the redevelopment area) by $20,000 or more. We cannot answer that question. The answer seems somewhat speculative. On the one hand, the very purpose of redevelopment is to improve the area and property values within the area. It would seem counter-intuitive to assume that it will have no effect. Yet, the precise amount by which a particular property's value would be affected is highly questionable. It may be possible to get an appraiser or a business consultant to render an opinion as to the effect that redevelopment is likely to have on the value of the property. That may or may not result in useful information. Or, Supervisor Nutting could take the conservative route and assume that redevelopment activity might impact the value of the property owned by the trust by more than $20,000 and disqualify himself from participation in the decision.

As stated earlier in this memorandum, County Counsel is not the final authority on matters of conflict of interests under the Political Reform Act. Following counsel's advice does not give a public official immunity for their actions. Only a formal advice letter from the FPPC can do that. Since I am advising all three officials not to participate in the action before the Board, the risk in this case is minimal. But, if any Supervisor who is the subject of this letter desires to obtain a formal opinion from the FPPC to ask for their opinion on their status, we would be pleased to request such a letter. There are a lot of facts associated with this situation which are not directly addressed by the regulations, and we have had to extrapolate from the regulations to the current situation. We have tried to apply the regulations in accordance with their intent. But, there is a possibility that the FPPC's interpretation could differ from our opinions.

Applicability of This Opinion to Prior Action of the Board:

On October 26, 2010, the Board adopted an ordinance authorizing the City of Placerville to include certain unincorporated County territory in its plans for redevelopment. In our

opinion, this memorandum advising that certain Board members have conflicts of interests in acting on the present ordinance approving the redevelopment plan does not bear on that prior action. The action taken authorizing the City to proceed with their planning efforts, including unincorporated territory, is a substantially different type of action that the one before you now. One important difference is that the prior action is not one of the specified actions in Regulation § 18704.2 which would render the property "directly" involved in the governmental decision. The decision to authorize development of an unincorporated area is a geographically limited decision affecting only the property in that area. It is not approval of a redevelopment plan which is the adoption of a plan as an integrated whole. Since Supervisors Sweeney and Briggs own property which is more than 500 feet from the boundaries of the unincorporated area, their property is deemed to be "indirectly" involved in the governmental decision.

Since their properties are deemed to be indirectly involved in the governmental decision, the financial effect of the decision is presumed not to be material. Regulation § 18705.2(b). This means that they had no conflict of interests in acting on the authorization. That section of the regulations does provide that the presumption that the impact is not material is rebuttable by proof that there are specific circumstances regarding the government decision, its financial effect, and the nature of the real property in which the public official has a financial interest which make it reasonably foreseeable that the decision will have a material effect on the property. We doubt that such a showing could be made, particularly in view of the very preliminary nature of the action, its limited geographical effect and the speculative nature of any action to be taken as a result of that action.

The action of the Board on October 26, 2011, was essentially authorization to the City to develop a redevelopment plan including some unincorporated territory. There was no assurance that the City would do so or, in fact, adopt any redevelopment plan at all. There was no assurance of what the redevelopment plan as a whole would include. And there was, and is, no assurance that the Board will approve the redevelopment plan as presented. If it does not, then the original authorization is of no force and effect.

Having concluded that there does not appear to be a violation of the conflict of interest laws with respect to the Board's prior action, we do conclude that applying different standards to the two actions creates an unusual public perception. To eliminate the perceived inconsistency between the two actions, and to eliminate any cloud that may hang over the proceedings as a result of charges of conflict of interest with respect to the first action, we recommend that the Board, acting after it constitutes itself in accordance with the conflicts of interests laws, adopt an ordinance ratifying and reaffirming the prior ordinance authorizing the City to include the unincorporated territory in its redevelopment activities, and then consider the ordinance approving the redevelopment plan.

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 one of them randomly to participate in the anticipated action of the Board on April 26, 2011, and subsequent actions, if necessary. If any member of the Board affected by this report wish to obtain a letter opinion from the FPPC on this issue, they should so indicate.

We would be pleased to answer any questions the Board might have.

Respectfully submitted,

Louis B. Green
County Counsel

LBG/stl
S:\Bd of Supervisors\Correspondence\Placerville Redevelopment – Conflicts of Interests v3