



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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July 31, 2023

Ishvi Aum
Board Member MCCSD
Mendocino City
PO Box 1033
Mendocino, CA 95460

Re: Your Request for Informal Assistance
Our File No. I-23-109

Dear Mr. Aum:

This letter responds to your request for advice regarding the conflict of interest provisions of the Political Reform Act (the “Act”).¹ Because you have not identified a specific governmental decision for analysis, we are treating your request as one for informal assistance.²

Please note that we are only providing advice under the conflict of interest provisions of the Act and not under other general conflict of interest prohibitions such as common law conflict of interest or Section 1090.

Also note that we are not a finder of fact when rendering advice (*In re Oglesby* (1975) 1 FPPC Ops. 71), and any advice we provide assumes your facts are complete and accurate. If this is not the case or if the facts underlying these decisions should change, you should contact us for additional advice.

QUESTION

Under the Act, as a member of the Mendocino City Community Services District, may you take part in governmental decisions involving the District’s ground water management plan, given that you own real property, leased to several tenant businesses, that would be affected by such decisions?

CONCLUSION

Generally, the Act would ordinarily prohibit you from taking part in such decisions because they would affect the development criteria applying to your real property and the real property interests of your tenant sources of income. However, the “public generally exception” applies with

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 18104 through 18998 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.

² Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c)(3).)

respect to governmental decisions affecting a significant segment of the jurisdiction that would not uniquely affect your economic interests. Accordingly, the public generally exception may apply and permit you to take part in governmental decisions affecting the ground water management plan, depending on the circumstances of the governmental decisions at issue. If you have any questions regarding a specific governmental decision, you should seek additional advice.

FACTS AS PRESENTED BY REQUESTER

You are a new member of the Board of Directors of the Mendocino City Community Services District (MCCSD), a California Community Services District. You are also a long-time resident, landlord, and business owner in the town of Mendocino, which is within the MCCSD.

The MCCSD is governed by an elected five-member Board of Directors. Under MCCSD's ground water management (GWM) plan, MCCSD has the authority to issue Groundwater Extraction Permits and to monitor water usage on every parcel in the District. Groundwater extraction permits are often required prior to any development within the boundaries of the MCCSD. This process has often inhibited projects before they could even proceed to review by the County Planning and Building Departments. A number of business owners and residents in the town believe it is time to reevaluate the GWM and permitting process and standards.

You are a lifetime resident of Mendocino County and have been a building contractor there for 25 years. In 2014, you bought a mixed-use, residential and commercial, property within the town of Mendocino. You operate it as a landlord and in 2011 you moved onto the property and made it your residence. Your company, Aum Construction, has occupied an office space there since 2015. In a follow-up email, you clarified your tenants include seven businesses: a hair stylist, a photo studio, a tea company, a clothing store, a massage studio, and a tattoo parlor.

During the almost 10 years you have owned the property, you and your tenants have been frustrated, as have many of the town businesses, by your inability to change property uses based on a GWM plan dating back to the 1980s.

By loosening or tightening restrictions on groundwater usage under the GWM plan, any action of MCCSD would affect over 25 percent of all businesses within MCCSD and over 25 percent of all commercial real property within MCCSD. In a follow-up email, you clarified that any changes to the GWM plan would affect the entire jurisdiction in the same way, not just a portion of the jurisdiction, and you own one parcel of real property. In a follow-up phone call, you also clarified that any governmental decisions involving a change to the GWM plan would apply on a per-parcel basis.

ANALYSIS

Under Section 87100 of the Act, “[a] public official at any level of state or local government shall not make, participate in making or in any way attempt to use the official’s position to influence a governmental decision in which the official knows or has reason to know the official has a financial interest.” “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 the

official's immediate family," or on certain specified economic interests. (Section 87103.) Among those specified economic interests are:

- (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, 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.

(Section 87103.) You have economic interests in your real property, your business, and in your tenants as sources of income.

Regulation 18701(a) provides the applicable standard for determining the foreseeability of a financial effect on an economic interest explicitly involved in the governmental decision. It states, "[a] financial effect on a financial interest is presumed to be reasonably foreseeable if the financial interest is a named party in, or the subject of, a governmental decision before the official or the official's agency. A financial interest is the subject of a proceeding if the decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the financial interest, and includes any governmental decision affecting a real property financial interest as described in Regulation 18702.2(a)(1)-(6)."

Where an official's economic interest is not explicitly involved in the governmental decision, the applicable standard for determining the foreseeability of a financial effect on the economic interest is found in Regulation 18701(b). That regulation provides, "[a] financial effect need not be likely to be considered reasonably foreseeable. 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."

The reasonably foreseeable financial effect of a governmental decision on a parcel of real property in which an official has a financial interest, other than a leasehold interest, is material whenever the governmental decision involves the adoption of or amendment to a development plan or criteria applying to the parcel. (Regulation 18702.2(a)(1).)

The reasonably foreseeable financial effect of a governmental decision on an official's source of income is material if the source is a business entity that will be financially affected under the materiality standards in Regulation 18702.1. (Regulation 18702.3(a)(4).) Relevant here, the reasonably foreseeable financial effect on a business entity is material if the official knows or has reason to know that the entity has an interest in real property and the property is a named party in, or the subject of, the decision under Regulations 18701(a) and 18702.2(a)(1) through (6), or there is clear and convincing evidence the decision would have a substantial effect on the property. (Regulation 18702.1(a)(4).)

Updates to the GWM plan affecting the development criteria of your real property would have a reasonably foreseeable, material financial effect on each of your economic interests pursuant to the above standards. With respect to your real property interest, changes to the GWM plan would involve the amendment of development criteria applying to the parcel, as changes to permissible water usage levels or rates would generally impact how the property may be developed; for instance, if running a restaurant would require usage of a certain amount of water not permitted under the GWM plan, then the underlying real property is effectively barred from being developed into a restaurant. (Regulation 18702.2(a)(1).) With respect to your tenant sources of income that are businesses that have leasehold interests in your real property, Regulation 18702.2(a)(1)-(6) are inapplicable to leasehold interests and, therefore, would not apply to your tenants' leasehold interests in your real property. However, a change to the restrictions on groundwater usage and related permits for groundwater extraction applying to the underlying property could still amount to a substantial effect on your tenants that are sources of income to you, as changes to rules regarding groundwater extraction permits and to monitoring of water usage could affect, for example, the development potential and the use of the property itself. For example if a tenant business located on the property relies on a high usage of water and the amount of water permitted to be used by the property becomes restricted this would affect that tenant business substantially. Likewise if the current businesses located on the property are allowed the use of more water, their business production could increase. Therefore, GWM plan decisions would have a reasonably foreseeable, material financial interest on your tenants as source of income interests. Accordingly, under the Act, you would generally be prohibited from taking part in decisions involving the potential amendment of the GWM plan.

Under Sections 87100 and 87103, a public official is prohibited from taking part in a governmental decision that would have a reasonably foreseeable, material financial effect on the official's interest(s) *if* that effect is distinguishable from the effect on the public generally. If the effect is indistinguishable from the effect on the public generally, the "public generally exception" applies and the official is not prohibited from taking part in the governmental decision. A governmental decision's financial effect on a public official's financial interest is indistinguishable from its effect on the public generally if the official establishes (1) that a significant segment of the public is affected and (2) the effect on the official's financial interest is not unique compared to the effect on the significant segment. (Regulation 18703(a).) A significant segment of the public is:

- (1) At least 25 percent of:
 - (i) All businesses or non-profit entities within the official's jurisdiction;
 - (ii) All real property, commercial real property, or residential real property within the official's jurisdiction; or
 - (iii) All individuals within the official's jurisdiction.

(Regulation 18703(b).)

Regulation 18703(c) provides that a "unique effect" on a public official's financial interest exists if a decision will have a disproportionate effect on:

- (1) The development potential or use of the official's real property or on the income producing potential of the official's real property or business entity.

- (2) The official's business entity or real property resulting from the proximity of a project that is the subject of a decision.
- (3) The official's interests in business entities or real properties resulting from the cumulative effect of the official's multiple interests in similar entities or properties that is substantially greater than the effect on a single interest.
- (4) The official's interest in a business entity or real property resulting from the official's substantially greater business volume or larger real property size when a decision affects all interests by the same or similar rate or percentage.
- (5) A person's income, investments, assets or liabilities, or real property if the person is a source of income or gifts to the official.
- (6) The official's personal finances or those of his or her immediate family.

You have indicated that changes to the GWM plan would affect the entire jurisdiction, satisfying the requirement that the governmental decision effect a significant segment of the public. Aside from your personal residence and business office, you have seven sources of income—that is, your seven tenant businesses taking up seven retail spaces—that would also be affected by changes in development potential that may, in turn, affect the income producing potential of the businesses or the underlying real property. Your residence, your business and the seven tenants are located on a single parcel of real property. You have indicated that any governmental decision involving a change to the GWM plan would apply on a per-parcel basis. To the extent that remains accurate, it does not appear likely that you would experience a unique financial effect on your real property. The development or income producing potential of your real property would not likely be disproportionately affected as compared to most other real property in the jurisdiction.

However, because you have interests in multiple business source of income tenants, you have multiple business interests, which could cumulatively result in a substantially greater financial effect than the effect on a single interest, depending on the specifics of the governmental decision at issue. Additionally, there may be a unique effect on your interest in your business tenant sources of income, your business and your real property if your real property has a substantially greater business volume or larger real property size than other properties in the jurisdiction when a decision affects all interests by the same or similar rate or percentage. For these reasons its possible the public generally exception may not apply depending on the decision at hand and its possible effect.

Because no particular governmental decision is before the MCCSD at this time, we are unable to provide definitive advice on whether the public generally exception would apply with respect to a particular governmental decision, but unless a GWM plan decision would apply in a manner that would have a unique effect on your economic interests, the exception will generally apply. If a governmental decision comes before the MCCSD and you are uncertain about whether the general analysis provided in this informal assistance letter would still be applicable, you should seek additional advice.

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

Sincerely,

Dave Bainbridge
General Counsel

By:



Kevin Cornwall
Counsel, Legal Division

KMC:aja