



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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November 18, 2016

NOV 21 2016

COUNTY COUNSEL

Alison Barratt-Green
County Counsel
Office of the County Counsel
950 Maidu Avenue, Suite 240
Nevada City, CA 95959

Re: Your Request for Advice
Our File No. A-16-206

Dear Ms. Barratt-Green:

This letter responds to your request for advice on behalf of the Nevada County Historical Landmarks Commission regarding the financial disclosure provisions of the Political Reform Act (the "Act").¹ Because the Fair Political Practices Commission does not act as a finder of fact when it provides advice (*In re Oglesby* (1975) 1 FPPC Ops. 71), this letter is based on the facts presented.

QUESTION

Does the Act require Historical Landmarks Commission members to file statements of economic interests ("SEIs")?

CONCLUSION

Yes. The Historical Landmarks Commission members must file SEIs and comply with the Act's conflict-of-interest provisions, and the Commission must adopt a conflict-of-interest code or be included within the County's Code, because the Commission members are "public officials" engaged in decisionmaking² under the Act.

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.

² Under Regulation 18329.5(c), "The Commission may, upon request, provide advice or technical assistance to a party for the purpose of determining whether that party is an agency as defined in [Sections] 82041 and 82049, and is therefore required to adopt and promulgate a Conflict of Interest Code pursuant to Government Code Section 87300. The Commission may also, upon request, provide advice or assistance to an agency concerning which positions should be designated in the agency's Conflict of Interest Code through application of [Regulation] 18701."

FACTS

You are the Nevada County Counsel and the authorized representative of the Historic Landmarks Commission. The Board of Supervisors established the Commission in 1969. The Commission's purpose is "to promote the general welfare of Nevada County and its citizens through official recognition, recording, marking, preserving and promoting the historical resources of Nevada County." Toward that end, the Commission is authorized to "prepare an application form for registration of all proposed historical landmarks in Nevada County, establish procedures for the submittal and verification of all proposed historical landmarks, and present all proposed historical landmarks to the Board of Supervisors for final approval."

You state that, over the past 23 years, the significant majority of the Commission's designation recommendations have been unanimously approved by the Board without significant modification. You reviewed the agendas and minutes of Board meetings, and the Board has often passed the resolutions approving the Commission's recommendations through its Consent Calendar. You note that over the past several years, the Board only removed one of the Commission's recommendations from its Consent Calendar, and ultimately, it approved that recommendation without significant modification.

The Chairman of the Commission, Bernard Zimmerman, presented supplemental information relating to the question presented. The Chairman noted that during his three years on the Commission, it has submitted six designation recommendations to the Board, and of those recommendations, the Board has approved three and rejected one, and two are pending. The Chairman asserts that the rejection of one of the Commission's recommendations indicates that Commission members are not "public officials" under the Act.

In July of 2015, the Commission recommended that the Board approve the designation of Hunt's Hill, a historic mining community located in a geographic area rather than identifiable parcel of property within Federal Bureau of Land Management land. County staff rejected that recommendation because the County Counsel determined that it did not comply with Public Resources Code Section 5029. That provision governs historical resource designations by local agencies, including the County, and requires that the local-agency resolution establishing the designation include "the name of the current property owner . . . and a legal description of the property." Because the submitted resolution did not include the name of the current property owner and a legal description of the property, County staff rejected the recommendation.

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).) Toward that end, the Act 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. (Section 87100.) Under the Act, a prohibited conflict of interest exists whenever a public official takes part in a decision that would have a reasonably foreseeable material financial effect on one or more of the official's financial interests identified in Section 87103.

In furtherance of this prohibition, the Act requires all local government agencies to adopt a conflict-of-interest code that sets forth appropriate financial disclosure categories for public officials who engage in governmental decisionmaking. (Sections 87300 and 87302.) The Act defines “public official” as every member, officer, employee, or consultant of a state or local government agency. (Section 82048.) For the purpose of further defining “public official,” Regulation 18700(c)(2) defines “member” as follows:

“(2) ‘Member’ does not include an individual who performs duties as part of a committee, board, commission, group, or other body that does not have decisionmaking authority.

“(A) A committee, board, commission, group, or other body possesses decisionmaking authority whenever:

“(i) It may make a final governmental decision;

“(ii) It may compel or prevent a governmental decision either by reason of an exclusive power to initiate the decision or by reason of a veto that may not be overridden; or

“(iii) It makes substantive recommendations and, over an extended period of time, those recommendations have been regularly approved without significant amendment or modification by another public official or governmental agency.

“(B) A committee, board, commission, group, or other body does not possess decisionmaking authority if it is formed or engaged for the sole purpose of researching a topic and preparing a report or recommendation for submission to another public official or governmental agency that has final decisionmaking authority, and does not meet any of the criteria set forth in subsection (2)(A)(i-iii).”

Thus, the Historic Landmarks Commission has decisionmaking authority if it has the ability to (1) make a final decision, (2) compel or prevent a decision, or (3) make substantive recommendations that are regularly approved without significant amendment or modification over an extended period of time. If the Commission has decisionmaking authority under any of these of tests, its members would be “public officials” engaged in decisionmaking under the Act. Moreover, the Commission must duly adopt a conflict-of-interest code requiring its members to file SEIs, or the County must add the Commission’s members to its conflict-of-interest code.

The purpose of the Commission is “to promote the general welfare of Nevada County and its citizens through official recognition, recording, marking, preserving and promoting the historical resources of Nevada County.” Toward that end, the Commission is authorized to “prepare an application form for registration of all proposed historical landmarks in Nevada County, establish procedures for the submittal and verification of all proposed historical landmarks, and present all proposed historical landmarks to the Board of Supervisors for final approval.” Based on the facts presented, the Commission does not have the authority to make a final decision or to compel or prevent a decision. (See Regulation 18700(c)(2)(A)(i) and (ii).) Therefore, the question of whether the Commission has decisionmaking authority distills to whether it makes “substantive

recommendations” that are “regularly approved without significant amendment or modification” by the Board of Supervisors “over an extended period of time.” (See Regulation 18700(c)(2)(A)(iii).)

The Board of Supervisors established the Historical Landmarks Commission in 1969. You state that, over the past 23 years, the significant majority of the Commission’s recommendations have been approved unanimously by the Board of Supervisors without significant modification. You reviewed the agendas and minutes of Board meetings, and the Board has often passed the resolutions approving the Commission’s designation recommendations through its Consent Calendar, indicating that those recommendations were not the subject of discussion or deliberation by the Board prior to their approval. You note that over the past several years, the Board only removed one of the Commission’s designation recommendations from its Consent Calendar, and ultimately, it approved that recommendation without significant modification.

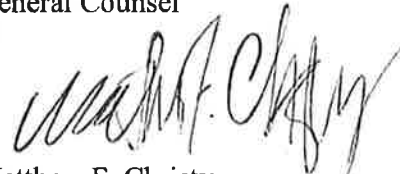
The Chairman of the Historical Landmarks Commission presented supplemental information relating to the question presented. The Chairman noted that during his three years on the Commission, it has submitted six designation recommendations to the Board, and of those recommendations, the Board has approved three and rejected one, and two are pending. The Chairman asserts that the rejection of one of the Commission’s designation recommendations indicates that Commission members are not “public officials” under the Act. However, the rejection of a single recommendation does not negate the fact that the Board of Supervisors has approved a significant majority of the Commission’s recommendations for the past 23 years. Moreover, County staff rejected that designation recommendation because the County Counsel determined that it did not comply with state law, not because the Board took issue with the content of the recommendation.

Therefore, in consideration of all the facts presented, we conclude that the Commission has decisionmaking authority because it makes and has made substantive recommendations that are regularly approved by the Board without significant amendment or modification over an extended period of time. Accordingly, the Commission members are public officials engaged in decisionmaking under the Act, the Commission must adopt a conflict-of-interest code or be included within the County’s code, and Commission members must file SEIs as required and comply with the Act’s conflict-interest provisions.

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

Sincerely,

Hyla P. Wagner
General Counsel



By: Matthew F. Christy
Counsel, Legal Division

MFC:jgl

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February 3, 2017

Via U.S. Mail and E-mail

Niel Locke
800 Lindley Avenue
Nevada City, CA 95959
baiwang@netscape.net

Dear Mr. Locke:

For some time, we have been discussing the issue of whether or not members of the Historical Landmarks Commission must file a Statement of Economic Interests Form ("Form 700") and be included in the County's Conflict of Interest Code, in accordance with the Political Reform Act, Gov't Code sections 81000, *et seq.* ("the Act"). To resolve the issue, last fall my office requested a formal advisory opinion from the Fair Political Practices Commission ("FPPC"), the state agency charged with enforcing the Act. The Commission submitted its own supplemental information packet for the FPPC to consider in making a determination.

Enclosed is a copy of the FPPC's opinion letter in response to the County's request. The FPPC concludes that members of the Historical Landmarks Commission are "public officials engaged in decisionmaking" as defined by the Act. As such, the Commission is required to either be included within the County's conflict of interest code or adopt its own conflict of interest code. Members of the Commission must also file Statements of Economic Interest and otherwise comply with the State's conflict of interest laws.

Commissions appointed by the Board of Supervisors are included within the County's Conflict of Interest Code. To ensure compliance with the FPPC's determination and maintain consistency, I will be recommending that the County's Code be amended to designate members of the Historical Landmarks Commission as persons required to file a Form 700 under Disclosure Category 1. Disclosure Category 1 requires that designees report "all sources of income, interests in real property, and investments and financial interests in business entities located or doing business in Nevada County." I will present this recommendation to the Board of Supervisors at its regular meeting on March 14, 2017.

Niel Locke
February 3, 2017
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I have also enclosed a copy of the FPPC Form 700 information packet which the County provides annually to all designated filers, to assist you in understanding how this requirement may affect you.

I would be happy to attend your next Commission meeting to answer any questions regarding this issue, and will be reaching out to the Chair of the Commission to see if that can be arranged. In the meantime, please do not hesitate to contact me if you have any questions or concerns, or would like to discuss this matter further.

Very truly yours,



Alison A. Barratt-Green
County Counsel

ABG/ch
Encs. (2)
cc: Hank Weston, Chair
Nevada County Board of Supervisors