



STATE OF CALIFORNIA  
FAIR POLITICAL PRACTICES COMMISSION  
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June 22, 2023

Joel Ellinwood  
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County of Benito  
481 Fourth Street, 2nd Floor  
Hollister, CA 95023

Re: Your Request for Informal Assistance  
**Our File No. I-23-101**

Dear Mr. Ellinwood:

This letter responds to your request for advice on behalf of the Pacheco Storm Water District (“PSWD”) and its board of trustees regarding the conflict of interest provisions of the Political Reform Act (the “Act”).<sup>1</sup> Because your inquiry is general in nature, we are treating your request as one for informal assistance.<sup>2</sup>

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

Does the Act prohibit members of the District Board of Trustees or its advisory committee from taking part in decisions to provide for storm water protection by the District or may the official take part in the decision under the Act’s public generally exception for decisions in which the effect on the official’s interest is indistinguishable for the general effect on the public?

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<sup>1</sup> 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.

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

## CONCLUSION

The application of the Act's conflict of interest provisions requires a factual analysis of the particular decision before the official and generally requires consideration of each decision on a case-by-case basis. However, you have indicated that the decisions relate to repairs and debris removal resulting from storm damage occurring earlier this year. Accordingly, we note that officials are not generally disqualified from decisions if the decisions are limited solely to "repairs, replacement or maintenance of existing streets, water, sewer, storm drainage or similar facilities." Based on the facts provided, it appears that this exception would generally apply to decisions limited to levee repairs and debris removal necessitated by the storm damage. However, to the extent you need assistance determining whether any particular decision is limited to repairs, replacement, or maintenance, you should seek additional advice identifying the decision. We also note that the Act's conflict of interest provisions may not necessarily apply to the members of the advisory committee as analyzed below. In regard to the public generally exception, we cannot determine whether the exception applies without identifying a specific decision and factual circumstances of the decision. To the extent an official may be disqualified in the future, you may wish to seek further advice when a specific decision has been identified.

## FACTS AS PRESENTED BY REQUESTER

The PSWD was established on March 4, 1946, by Resolution of the Board of Supervisors of the County of San Benito for the approximately 1,412-acre area located in portions of San Benito and Santa Clara Counties in accordance with the Storm Water District Act of 1909. Currently there are 66 separate parcels in San Benito County with 48 different owners, and 23 parcels in Santa Clara County with 16 different owners within the boundaries of the district. The land uses in the district include both residential, mixed residential and agricultural, and exclusive agricultural properties, as well as habitat restoration or preservation areas.

The authorized purpose of a storm water district under the Storm Water District Act is "preventing or controlling soil erosion, of protecting the lands in such district from damage by storm-water, by the construction of dams, ditches, dikes, terraces and other structures, by planting of trees, shrubs, grasses or other vegetation and by spreading, conserving, storing, retaining or causing to percolate into the soil any or all water falling on or passing across said lands or of any innavigable stream, watercourse, canyon or wash." Powers of storm water districts include the "power in the name and in behalf of the district to purchase, receive by donation or acquire by condemnation any rights of way or other real or personal property necessary to carry out the purposes for which the district was formed," and, "to construct, maintain and keep in repair any and all improvements, requisite or necessary to carry out the purposes of the district; and to do any and all other acts and things necessary or required for the protection of the lands in said district from damage from storm waters and from waters of any innavigable stream, watercourse, canyon or wash."

The PSWD is governed by an elected Board of Trustees comprised of three "freeholders" (landowners) who are residents of the district. The current district trustees are Michele Schroeder, President; Paula Azcona, Vice-President; and Armando Alfaro. The district has no employees. The district does not currently receive any allocation of local property taxes or other assessments from

properties within the district. Any future assessments for district improvements or repairs or to repay loans or bonds are limited to ten years and are subject to voter approval.

In a follow up email, you stated that the PSWD Board of Trustees has an advisory committee that includes non-resident landowners or farming tenants who are therefore not eligible to themselves serve on the Board of Trustees, but who have significant historical knowledge of the history of the district or past flood events and conditions of the levees and stream channel condition, or past maintenance activities, and can share that expertise with the trustees.

PSWD acquired easements of record to construct and maintain levees within the district boundaries that were recorded in 1948, 1985, and 1988. The 1948 easements each granted, “to the Pacheco Storm Water District the right to construct a levee for the purpose of restraining flood waters to the channel of Pacheco Creek and the right to maintain and repair said levee across the lands hereinafter described, together with the right of ingress thereto and egress therefrom for such purposes.” The 1985 easements were each for a project, “... designed to prevent erosion of streambanks by installing vegetative and structural protection on various sites on Pacheco Creek,” granted PSWD, “...and its assigns the permanent right, privilege, and easement to enter upon and use the streambank of land hereinafter described, to survey, construct, reconstruct, operate, maintain, repair, and install vegetative and structural protection.” The 1988 easement contains similar provisions.

The real property within the district currently owned by Trustee Schroeder and her husband, is burdened by the easement in favor of the district. The real property currently owned by Trustee Azcona is burdened by the easement in favor of the district. Portions of the Pacheco Creek levees are located on the Schroeder and Azcona properties. The real property within the district owned by Trustee Alfaro and his wife is not burdened by an easement in favor of the district and does not include any flood protection facility constructed or controlled by the district.

Levee breaches resulting from storm events in early 2023 occurred on properties owned by others, including a corporation, one owner of which is a prospective member of the PSWD advisory committee. Damages from flooding resulting from the levee breaches were extensive throughout the area primarily south of Pacheco Creek throughout the area of the district and beyond, including to County roads Lovers Lane and San Felipe Road, but did not directly affect the Schroeder or Azcona homes or outbuildings. The Alfaro home and outbuildings were significantly damaged by flooding resulting from levee breaches on other properties with easements in favor of the district. Levee repairs and debris removal will broadly benefit the area of the district generally by restoring and improving protection from future flooding from storm events causing high water in Pacheco Creek.

Funds to construct and repair the levees were provided to PSWD from time to time by the United States Department of Agriculture, Soil Conservation Service and its successor agency, the Natural Resource Conservation Service and loans or grants from the County of San Benito. PSWD has a currently pending application with the Federal Emergency Management Agency (“FEMA”) and the California Office of Emergency Services (“CalOES”) for an estimated \$2.5 million grant for levee repairs and debris removal related to the 2023 storm damages.

In a follow up email, you stated that the PSWD was reconstituted by the appointment of the current board of trustees by the San Benito County Board of Supervisors primarily to address levee

repairs and debris removal related to the 2023 storm damages. PSWD holds easements of record granted between 1948 and 1988 to construct and maintain the levees and storm water protection activities in conjunction with federal funding. As such PSWD, and not the County, is eligible for FEMA and CalOES funding for disaster relief. The application for this funding in process, and the District Board of Trustees will likely need to take action to accept the funds, prepare plans and specifications, and accept bids for performing the work.

## 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 a 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 87103 provides that a public official has a "financial interest" in a decision, within the meaning of the Act, if it is reasonably foreseeable that the decision will have a material financial effect on one or more of the public official's interests that is distinguishable from the decision's effect on the public generally.

Section 87103 also describes the interests from which a conflict of interest may arise under the Act. As pertinent to the facts provided, those economic interests include "[a]ny real property in which the public official has a direct or indirect interest worth two thousand dollars (\$2,000) or more." (Section 87103(b).) Accordingly, the officials you have identified, Trustees Schroeder, Azcona, and Alfaro each have a potentially disqualifying economic interest in their respective residential real property interests.<sup>3</sup>

When a public official's economic interest is explicitly involved in a governmental decision, Regulation 18701(a) provides that:

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, including any decision affecting a property interest as described in Regulation 18702.2(a)(1)-(6).

If an interest is not explicitly involved in the decision, a financial effect is reasonably foreseeable if the effect can be recognized as a realistic possibility and more than hypothetical or

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<sup>3</sup> You have not identified the economic interests any other economic interests of the officials. However, we caution that to the extent the decision may affect a business in which the officials have an interest, you may wish to seek additional advice. We also caution that you have not identified any member or the advisory committee. To the extent the advisory committee has decisionmaking authority, the Act's conflict of interest provisions would similarly apply to any member of the advisory committee with an interest in property affected by the decisions.

theoretical. If the financial result cannot be expected absent extraordinary circumstances not subject to the official's control, it is not reasonably foreseeable. (Regulation 18701(b).)

Different standards apply to determine whether a reasonably foreseeable financial effect on an interest will be material depending on the nature of the interest. Regulation 18702.2 defines when a financial effect of a government decision on real property is material.

However, Regulation 18702.2(d)(1) provides an exception for a decision that “solely concerns repairs, replacement or maintenance of existing streets, water, sewer, storm drainage or similar facilities.” In prior letters, we have applied the exception (in a prior iteration) in the following cases:

- *Stepanicich* Advice Letter, No. A-14-053: We found the exception to apply to a flood control project that was intended to achieve a nationally accepted standard of flood protection formulated to protect life and property. The various flood control measures that were considered for the project included stabilizing levees, clearing channels, widening channels, modifying bridges, and constructing floodwalls, detention basins and an underground bypass culvert.
- *Stovall* Advice Letter, No. A-08-112: We found that a project to dredge a 14-mile slough was a “storm drainage or similar facility” and that the dredging of the silted-up slough was a repair or maintenance activity.
- *Murphy* Advice Letter, No. A-07-134: We found that a city council’s decisions to finance engineering studies or to hire consulting firms to review facility and environmental concerns for approximately 45 miles of levees were decisions solely concerning the repair or maintenance of the levee system. We said that “flood control work presents a unique question of interpretation. By design, flood control work is performed to increase protection from flooding. However, the majority of flood control work for a city protected by a system of levees could just as easily be classified as ‘repairs’ or ‘maintenance’ as opposed to an ‘improvement,’ despite the fact that the work will in some way increase the city’s flood protection.” However, any proposed work which would provide protection for an official’s property interest beyond the level of protection provided for the remainder of the City must be considered an “improvement.”
- *Cauble* Advice Letter, No. I-06-179: We found the exception to apply where a flood control project to remove roots and vegetation from a slough would increase its flood control capacity. Because the slough’s clogging was caused by flood control measures taken twenty years earlier, the project was meant to repair, replace, or maintain the slough’s storm drainage capacity as it once existed.

Under the limited facts you have provided, the scope of the types of decisions you anticipate coming before the Board would not appear to grant the trustees “new and improved services.” Moreover, the facts provided indicate that the decisions relate to the repair and removal of debris arising out of storm damage earlier in the year. Accordingly, we note that officials are not generally disqualified from decisions due to an interest in property if the decisions are limited to repair, replacement, or maintenance of the existing levees and storm water control facilities. Based on the facts provided, it appears that this exception would generally apply to decisions limited to levee

repairs and debris removal necessitated by the storm damage. To the extent that any upcoming decisions would fit within the parameters of the regulatory exception explained above, the officials identifies would not be prohibited from taking part in the decisions. However, once specific decisions have been identified, you may wish to seek additional advice if you are still uncertain as to the applicability of this exception.

Additionally, please be aware that as the process proceeds if the decisions should change to ones that involve “new and improved services” rather than the repair, replacement and maintenance of the existing facilities, you should contact us for further advice.

#### *PSWD Advisory Committee*

In regard to members of the advisory committee, the threshold question in determining if the members of the advisory committee are subject to the Act’s conflict-of-interest provisions is whether the members are “public officials.” For purposes of the Act, Section 82048 defines “public official” as every member, officer, employee or consultant of a state or local government agency. The term member is further defined by Regulation 18700(c)(2), which states:

(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 advisory committee would be deemed to have decisionmaking authority if it (1) makes a final decision, (2) can compel or prevent a decision, or (3) makes substantive recommendations over an extended period of time that are regularly approved without significant amendment or modification. Additionally, a committee does not possess decisionmaking authority when it is formed for the sole purpose of researching and preparing a report for submission to another government agency that has final decisionmaking authority.

If the advisory committee has decisionmaking authority under any of the above tests, its members would be considered public officials and are subject to the Act’s conflict of interest

provisions. However, not having those facts, we do not reach a conclusion as to whether members of the advisory committee are “public officials” for purposes of the Act’s conflict of interest rules. You may wish to contact us with additional facts if you need further assistance in making this determination.

### *Public Generally*

The Act does not generally prohibit an official from taking part in a decision if the financial effect on a public official’s financial interest is indistinguishable from its effect on the public generally. Under Regulation 18703, the Public Generally Rule applies if the official establishes that a significant segment of the public is effected and the official’s financial interest is not unique compared to the effect on the significant segment. A significant segment of the public includes “[a]t least 15 percent of residential real property within the official’s jurisdiction if the only interest an official has in the governmental decision is the official’s primary residence.” (Regulation 18703(b)(2).) However, each decision must be reviewed on a case by case basis, and we are unable to determine if this exemption would apply until a specific decision has been identified. Accordingly, you may wish to seek further advice when a specific decision has been identified.

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

Sincerely,

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General Counsel

**Zachary W. Norton**

By: Zachary W. Norton  
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