

NEAL E. COSTANZO  
MICHAEL G. SLATER

LAW OFFICES  
**COSTANZO & ASSOCIATES**

A PROFESSIONAL CORPORATION  
575 E. LOCUST AVENUE  
SUITE 115  
FRESNO, CALIFORNIA 93720-2928  
(559) 261-0163

FAX (559) 261-0706  
OUR FILE NO. 01236-503

October 21, 2011

Via Overnight Mail & Fax: (916) 322-0886  
Zackery P. Morazzini  
Fair Political Practices Commission  
428 J Street, Suite 620  
Sacramento, CA 95814

**Re: Request for Commission Review of Staff's Denial of Request for  
Formal Opinion; Your File No. 0-11-178**

Dear Mr. Morazzini:

Thank you for your October 4, 2011, letter. We cannot disagree with your observation that conflict of interest issues similar to those issues raised by our request for a formal opinion are the subject of several published Commission regulations and written advice letters of the Fair Political Practices Commission (FPPC). We also agree that regulation 18320(d) includes among the various criteria on which a denial of an opinion request may be based considerations relating to whether the question raised is covered by Commission regulations or raises no 'substantial question of interpretation' so that it requires "only a routine reply more appropriately made by staff." We disagree, however, that these regulatory criteria can serve as a basis for your October 4, 2011, denial of the City of Selma's request for a formal opinion.

Your letter states the basis for denying the requested opinion as follows:

"There is no justification in your facts or in your question that would elevate these traditional, though fact dependent, conflict of interest questions to the status of a Commission opinion. While it is true that Commission staff advice would be declined in this case because staff does not generally advice on past conduct, this in itself would not be a basis to justify a Commission opinion. For these reasons, I am denying your request for an opinion".

We agree the questions raised by the request amount to "traditional" and "fact dependent" conflict of interest inquiries. Specifically, the question raised, with respect

to Councilman Michael Derr is whether the identified financial interest arising from his wife's part time employment with the Selma Chamber of Commerce gave rise to a material and foreseeable impact on that financial interest from the governmental decision consisting of Councilman Derr's vote in favor of the City 2011-12 Budget which includes an allocation of \$14,000 to the Selma Chamber of Commerce. Similarly, the question raised with respect to Mayor Kenneth Grey deals with whether the financial interest of the Mayor arising from a contractual relationship with CalWater, the water purveyor for the City of Selma, gave rise to a disqualifying financial conflict of interest with respect to the Mayor's vote and participation in a decision to authorize a request to CalWater to voluntarily, or by application to the California Public Utilities Commission (CPUC), reduce rate increases. As with the governmental decision in Councilman Derr's case, the situation relating to Mayor Grey's participation in the proceedings of the City Council leading to a joint petition to the CPUC for a reduction or deferral of rate increases involves an assessment of the foreseeable impact of that governmental decision on the financial interest involved. The case relating to Mayor Grey, also involves the question of whether his interest in proceedings relating to the processing of that petition seeking the rate adjustment is or is not indistinguishable from the impact of the governmental decision on the public in general, thereby falling within the recognized exception to the conflict of interest rules.

The FPPC regulations and published advice letters make clear that whether a given governmental decision will have a reasonably foreseeable effect on a public official's economic interests is a highly fact specific determination, made on a case by case basis. In published advice letters, FPPC has repeatedly indicated that it will not act as a fact finder in providing advice on foreseeability determinations of a particular financial effect and that such determinations must normally be left to the informed judgment of the public official. (*In Re Ronald R. Ball, CAFPPCADV I-11-044*). Thus, published advice letters do not address the question of reasonable foreseeability. Accordingly, the question raised is not answered by published advise letter as your October 4, 2011, letter suggests.

One of the criteria for denying the requested opinion - that the question raised is covered by Commission regulations - does not appear to be applicable. The regulations define reasonable foreseeability in relative terms only. An effect on a financial interest is defined as reasonably foreseeable if it is substantially likely to occur (Regulation 18706). Similarly, while the regulations seem to make clear that the financial interests of Michael Derr with respect to the Selma Chamber of Commerce is under the regulations only an indirect financial interest (Regulation 18704), the regulations provide that the determination of whether an indirect interest is nonetheless material is dependent upon whether the effect on the financial interest reasonably

foreseeable. (Id). Materiality, therefore, is, like foreseeability, a highly factually specific inquiry to be made on a case by case basis.

It is precisely because these questions raise the factually dependent issue of reasonable foreseeability that a “substantial question of interpretation” is presented. Statute provides that any person may request a formal opinion of the FPPC with respect to the duties of that person under Government Code §83114(a). A request for advice, concerning the foreseeability question, would require FPPC to speculate or forecast on resolution abstract or hypothetical situations involving the effect of a governmental decision not yet made. Here, by contrast, this is a request for an opinion based upon known facts that are set forth in detail in the request. The resolution of the foreseeability question, and the application of the exception with respect to decisions which do not affect the decision maker in a manner that is distinguishable from the effect on the public at large, can be determined in an opinion without the necessity of speculating or forecasting the effects of the governmental decision because the facts bearing on those effects have crystalized to a point where those effects can be evaluated with certainty. The matter is ripe for an opinion. (See *Wilson & Wilson v. City Council of Redwood City* (2011) 191 Cal.App.4th 1559, 1583-1584). This is why the Commission regulations setting forth the criteria for denying advice requests provide that the Commission does not provide advice on matters relating to past occurrences or conduct, while regulations dictating the criteria for denying an opinion request do not preclude the issuance of an opinion that relates to such past events or conduct. The questions raised here present a substantial issue of interpretation of the conflict of interest rules and requirements because these cases provide the Commission with an avenue for defining, by reference to specific facts, what it is that amounts to a foreseeable effect on a financial interest of a given governmental decision.

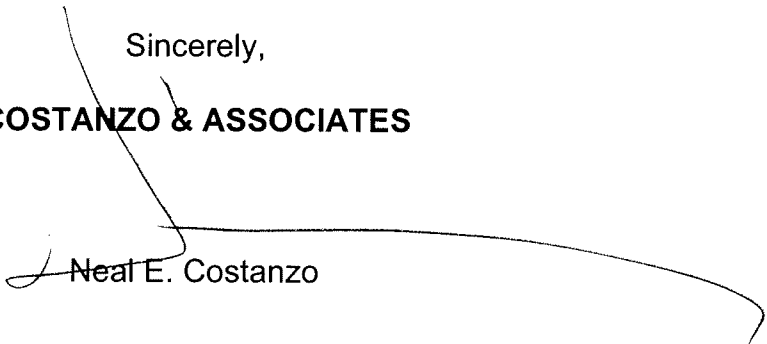
Accordingly, this will serve as a request pursuant to Regulation 18321 for review of your decision to deny our request for issuance of a formal opinion by the Commission. No particular form for this type of request is prescribed by your regulations. The reasons for the request is that the denial of the request for an opinion does not meet the criteria upon which denial of an opinion request may be based as set forth in regulation 18320(d)(1)and (2). If the Commission disagrees with the foregoing evaluation showing that the questions raised do amount to substantial issues of interpretation, not answered by published advice or regulations of FPPC, we would request a more explicit “routine reply” by staff. Specifically, we would ask that the reply address whether the opinion is being denied because the question is answered by existing Commission opinions, advice letters or regulations, and if so, whether the staff reports included as Exhibit B to our original request properly apply those authorities.

Fair Political Practices Commission  
September 21, 2011  
Page 4

Thank you for your attention to this matter.

Sincerely,

**COSTANZO & ASSOCIATES**



Neal E. Costanzo

NEC/js  
Enc.